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1957

EDITORS

JOHN BURKE

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THE
CRIMINAL LAW REVIEW

Editors
JOHN BURKE and PETER ALLSOP, M.A.
Barristers-at-Law

Editorial

January 1, 1957

January 1, 1957, is the day appointed for a number of provisions affecting the criminal law to come into force. These include consolidating measures such as the Sexual Offences Act, 1956 ([1956] Crim.L.R. 709) and the Medical Act, 1956 (see p. 65), and the new Army and Air Force Acts ([1955] Crim.L.R. 440). Rules taking effect under the latter two Acts also come into force (see [1956] Crim.L.R. 347, 429).

Further sections of the Road Traffic Act, 1956 ([1956] Crim.L.R. 608, 673, 758) also come into operation on January 1, among them those relating to the provision of parking places.

The Mines and Quarries Act, 1954 ([1955] Crim.L.R. 126), which consolidates and revises the law relating to mines and quarries, comes into operation on the same day. A number of regulations, S.I. 1956, Nos. 1758–1784, have been made which are operative under the Act and these will be included in Acts and Orders next month; to a large extent they replace, with only minor amendment, existing regulations.

Eavesdropping

An unusual complaint was heard in Chesterfield Borough Magistrates' Court recently, namely, that the accused " did listen under walls or windows or the eaves of a house to hearken after discourse and thereupon to frame slanderous and mischievous tales." These words were taken, not from any ancient statute, but from Blackstone's reference to eavesdropping at common law and were used in a complaint against a "peeping tom." He was bound over under the Justices of the Peace Act, 1361, to be of good behaviour for twelve months in the sum of £15 and to find a surety in the sum of £5.

The adequacy of the punishments possible for such offences was questioned at [1954] Crim.L.R. 121.

R. v. Hughes

Mr. J. C. Smith writes: "In the commentary to *R.* v. *Hughes* [1956] Crim.L.R. 835 it was stated that it is difficult to reconcile *R.* v. *Jones* (1948) 33 Cr.App.R. 11 with *R.* v. *Bryce* [1956] Crim. L.R. 122 and the instant case. This perhaps makes it appear that *Jones* and *Bryce* reached different results. In fact the convictions were quashed in both cases. The difficulty is one of reconciling the result in *Jones* with the statement of the law in *Bryce* which was applied in *Hughes*."

The after-care of prisoners

The annual report for 1955 of the Council of the Central After-Care Association has been published. The difficulty of finding suitable accommodation for persons discharged from prison or Borstal who have no homes to go to on release remains one of the great practical problems of the Council. The Magistrates' Association convened a special conference to consider this question and it is hoped that from decisions then taken new and important developments may follow.

During 1955 there was a slight increase in the number of men released from sentences of preventive detention, the total being 106 as against 103 in 1954. The position on December 31, 1955, was that of the first 250 men to be released from sentences of preventive detention 154 had been reconvicted; of these 72 were given new sentences of preventive detention and 13 sentences of imprisonment for over four years. The number of prisoners sentenced to preventive detention again showed an upward trend, while sentences of corrective training continued to decrease.

The evidence suggests that the experiment of allowing certain prisoners a period of home leave shortly before discharge has been most successful and the practice is highly valued as a factor in successful after-care.

The girls of very low mentality released from sentences of Borstal training present a particular problem. It is always difficult to place them in suitable employment.

Old Bailey

A new form of oath is now being used for juries at the Old Bailey. Formerly juries swore that they would " faithfully try the several issues " and " a true verdict give " ; now they swear that they will " well and truly try " the issue and " give a true verdict."

A warning

The recorder of Liverpool, Mr. Neville Laski Q.C., took an unusual course when a youth of eighteen was convicted of blackmailing before him. He ordered the defendant to be taken to Walton Gaol " to see what sort of place he might have been sent to." On the youth's return the Recorder told him that had he been older he would have been sent to prison and, imposing a fine of £50, to be paid at the rate of £2 a week, Mr. Laski warned the defendant that if he defaulted in a single pound he would be sent to prison for six months.

A probation officer's report

Some confusion appears to exist as to how a probation officer's report should be presented to a court and what recommendations it should contain.

At Bedfordshire Quarter Sessions the chairman, Mr. C. L. Henderson Q.C., criticised a probation officer's report because it had been put before the magistrates without being shown to the prisoner and because in it the officer had said: " Unless the accused can be compelled to accept rehabilitation at some training centre I am of the opinion that a term of imprisonment is the only alternative to bring him to his senses."

The National Association of Probation Officers issued a statement in reply to these criticisms in which it was recognised that the decision about the treatment of an offender must be made by the court. But it was pointed out that " the probation officer's duty is to prepare for the guidance of the court a report on all the circumstances of an offender the court is about to deal with. He would be failing in his duty if he did not have the courage to say when he felt that some drastic treatment was necessary." As to the presentation of the probation officer's report it was observed that " section 43 of the Criminal Justice Act, 1948, makes it quite clear that where a report by a probation officer is made to any court, other than a juvenile court, with a view to assisting the court in determining the most suitable method of dealing with an offender, a copy of the report shall be given by the court to the offender or his representative. If, therefore, a report has been presented without the knowledge of the offender concerned, the criticism for this must rest with the court and not with the probation officer. His duty is completed when his report and observations are presented to the court."

New rules for drafting indictments

A Practice Direction has been issued concerning the drafting of indictments, see page 41, below. At page 70 we print, with permission, some correspondence between the Clerk to the Justices at Wakefield and the Registrar of the Court of Criminal Appeal, about matters arising from the new rules.

Approved probation hostels

A condition of some probation orders is that the offender shall reside at an approved hostel. In an interesting booklet, *Home Office Approved Probation Hostels,*[1] Mr. R. A. F. Cooks, who is the warden of the Leicester hostel, gives a short summary of the history of such hostels and makes a survey of the 106 boys who have stayed at the Leicester hostel since it was opened five years ago. His observations are of value to magistrates deciding whether to impose a condition of residence and Mr. Cooks makes certain pertinent recommendations as to policy in regard to such hostels.

The Clarke Hall lecture

The text of the sixteenth Clarke Hall lecture delivered in May, 1956, by Mr. J. F. Wolfenden, C.B.E., M.A., under the title "The Changing World and its Effect on Adolescent Behaviour," has been published. Mr. Wolfenden thinks that the fundamental difference between young persons today and previous generations is that "change has been their permanent background—not a change in a background of stability, but continuous and omnipresent change" and he considers the effect of this lack of stability.

Parliament

Compensation to persons wrongly prosecuted for criminal offences

The Home Secretary has stated the principles on which compensation is awarded or refused to persons wrongly prosecuted for criminal offences, found not guilty and acquitted. He distinguished between cases where there appears to be evidence sufficient to justify a prosecution but where in the event the charge is not proved and those cases where an innocent person is prosecuted because of negligence or misconduct on the part of the police or other public officials. In the former type of case it has never been the policy of the Government to make *ex gratia* payment; in the latter, where hardship has been caused, it is the practice to make such a payment. The court has power to award a defendant who is acquitted the cost of his defence in suitable cases (H.C. Debates, Vol. 560, col. *98*; November 22, 1956). See *R.* v. *Gale,* p. 47, below.

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[1] Chichester: Justice of the Peace, Ltd. 1956. i and 19 and (index) 2 pp. (3s. 6d. net.)

Identification parades

The Home Secretary does not think there is any ground for revising the present instructions of the Metropolitan Police as to identification parades (H.C. Debates, Vol. 560, col. 1125; November 15, 1956).

Judicial appointments

Mr. Rudolph Lyons, Q.C., has been appointed Recorder of the City of Newcastle-on-Tyne, Mr. R. H. Forrest, Q.C., Recorder of the City of Salford, Miss Rose Heilbron, Q.C., Recorder of the Borough of Burnley and Mr. M. J. Morris, Recorder of the Borough of Margate.

Mr. L. M. Pugh has been appointed Stipendiary Magistrate for the Borough of Huddersfield.

Police appointments

Mr. Joseph Simpson, an Assistant Commissioner, will succeed Sir Ronald Howe as Deputy Commissioner of Police of the Metropolis on January 20. Mr. A. Robertson and Mr. D. E. Webb have been appointed Assistant Commissioners.

Mr. R. L. Jackson, the Assistant Commissioner in charge of the Criminal Investigation Department at Scotland Yard has succeeded Sir Ronald Howe as the British representative of the international police organisation.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Parking and the Law

By Duncan Macrae, B.A., LL.B., *Barrister-at-Law*

Motorists, as other travellers, have a right to pass and repass upon the highway and they have no right to use it for any other purpose.[1] The essence of the modern parking problem in our large towns is that people who go to work in their cars have no alternative, very often, but to use the highway as a garage. This article sets out to summarise the legal traps into which they may fall.

At Common Law

The presence of a stationary vehicle on a road may amount at common law to a trespass or a public nuisance but this is not to say that there are no circumstances in which a vehicle may stop. There is a right of "reasonable stopping." In 1877 it was held that coal merchants had a right to unload ships at their wharf which abutted on a public navigable highway, the river Thames. Jessel M.R. said: "Besides a reasonable right of access, they have a reasonable right of stopping, as well as of going and returning in the use of the highway. But what is a reasonable right of stopping? That must depend upon circumstances. You cannot lay down *a priori* what is reasonable. You must know all the circumstances. It would be clearly reasonable, for instance, if a wheel came off an omnibus in the middle of a highway, for a blacksmith to be sent for to put the wheel on the omnibus . . . and the omnibus might lawfully stop there until the wheel was put on . . . " and "It is not illegal to bring in a coal waggon, which is a good deal longer than the frontage of your house, in front of your house to deliver the coal; otherwise people who have small houses could never have a coal waggon full of coals."[2]

A vehicle on a road may be a nuisance or, it is submitted a trespass, if its presence is unreasonable and this in turn depends upon all the circumstances of the case. One matter of importance is the length of time during which the vehicle is there. The presence of vans every alternate hour in a narrow street loading and unloading goods has been held to be unreasonable and a public nuisance.

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[1] *Harrison* v. *Duke of Rutland* [1893] 1 Q.B. 142; *Hickman* v. *Maisey* [1900] 1 Q.B. 752; *Rodgers* v. *Ministry of Transport* [1952] 1 All E.R. 634.

[2] *Original Hartlepool Collieries Co.* v. *Gibb* (1877) 5 Ch.D. 713.

" . . . in a case of doubt or difficulty, the private reasonable right of a householder to carry on his business must yield to the public right of user of the street. If the public right of user is, in fact, so obstructed that it cannot be used to the extent which the law requires, then the private right must give way, and it is no answer to say that the defendants can go on using this street in a way which is reasonable, looking at their interests alone. It is urged that it is difficult to draw the line. . . . Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? And yet, who has any difficulty in saying that an oak tree is a plant and not an animal? "[3]

Another matter which may be taken into account is whether the purpose in pursuance of which the vehicle stands is a legal purpose. It has been held that it does not necessarily follow from the mere fact that the owner was trespassing in an adjoining hay field that his car, which stood in a country lane, amounted to a nuisance.[4] If a poacher or a thief were to leave his car on the highway, it is submitted that there would be a trespass as against the owners of the subsoil of the highway. In a recent case[5] it was decided in the Divisional Court that lorry drivers who drove their lorries onto the grass verge of an arterial road were not doing anything illegal even though the verge was a part of the highway. Lord Goddard C.J. said: "I certainly cannot find that the fact that the lorries call at the café for refreshment causes an obstruction of the highway. They do not obstruct the highway merely by temporary call for a legitimate and proper purpose such as getting a meal while on the road, provided they do not stop in a place where the mere presence of a stationary vehicle would cause an obstruction." If these men had stopped, not on the verge, but on the carriage way itself, it may well be that they would have had difficulty in rebutting an accusation of unnecessary obstruction brought under the Construction and Use Regulations.

Because there is no right to use the highway as a day and night garage the occupier of a house adjoining the highway has no power to reserve for his own car the space immediately in front of his house; indeed if he parks his own car there for any length of time, he may lay himself open to a prosecution. Nor can he hope to keep other people away by putting up a private "No Parking" sign. Such a sign is of no legal effect and is in itself a contravention of the law.[6] His only remedy, if any particular person habitually parks outside his front door, is to sue that person in nuisance.

---

[3] *Att.-Gen.* v. *Brighton and Hove Co-operative Supply Association* [1900] 1 Ch. 276, *per* Lindley M.R.

[4] *Randall* v. *Tarrant* [1955] 1 W.L.R. 255.

[5] *Rodgers* v. *Ministry of Transport* [1952] 1 All E.R. 634.

Statute and Regulations made thereunder

The motorist who leaves his car in the streets of a town is much more likely to be prosecuted under a statute or regulation than to be proceeded against at common law. It is not possible in an article of this length to enumerate every statute and regulation which bears on the problem but the principal measures of national application are as follows.

It is an offence under the Highway Act, 1835, (a) wilfully to obstruct the free passage of any highway[7] and (b) to leave any cart or carriage on any highway so as to obstruct the passage thereof.[8]

The Town Police Clauses Act, 1847, provides that " Every person who . . . by means of any cart, carriage . . . or other means . . . wilfully causes any obstruction in any . . . public thoroughfare " shall be liable to a penalty.[9]

A prosecution may be brought under section 50 of the Road Traffic Act, 1930, if " any person in charge of a vehicle causes or permits the vehicle . . . to remain at rest on any road in such a position or in such condition or in such circumstances as to be likely to cause danger to other persons using the road."

The majority of prosecutions today are founded on the Motor Vehicles (Construction and Use) Regulations, 1955 (S.I. No. 482). Regulation 89 provides that " No person in charge of a motor vehicle or trailer shall cause or permit the motor vehicle or trailer to stand on a road so as to cause any unnecessary obstruction thereof." It is an offence under regulation 90 to cause or permit any motor vehicle to stand on any road during the hours of darkness otherwise than with the left or near side of the vehicle as close as may be to the edge of the carriageway, unless with the permission of a police officer.

It is a matter of common experience that many defendants who come unrepresented to court on a summons alleging obstruction plead not guilty in the belief that they have only to show that they have obstructed no particular person to be acquitted. As early as 1917 Lord Reading C.J. said in relation to section 28 of the Town Police Clauses Act, 1847: " In my judgment it is not necessary to prove that a person has been actually obstructed. It is quite sufficient to prove circumstances from which the justices can conclude that in the ordinary course persons may be obstructed, and that the actual user of the road was calculated to obstruct even though no person was proved to have been obstructed." [10] The facts of this case are of interest. Two horse drawn carts were left in a main road while the drivers were having their lunch in an inn and the horses were being watered by an ostler. There were tram lines down the middle of the road and a vehicle travelling so as to pass the carts on its near side would have to go upon the tram lines to clear them. It was argued that in these circumstances a tram might well be obstructed. Avory J. agreeing with the Lord Chief Justice was of the opinion that " the reason why the horses were standing was that there was a lawful excuse for it, in this sense, that the men had gone to get their dinner or tea, and the horses were stopped in order that they might be watered. In these circumstances . . . there was no evidence . . . of any unlawful or unreasonable user of the highway."

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[6] Road Traffic Act, 1930, s. 48 (3).

[7] Highway Act, 1835, s. 72.

[8] s. 78.

[9] Town Police Clauses Act, 1847, s. 28.

It is interesting to speculate whether there would have been any difference if a similar prosecution had been brought today under the Construction and Use Regulations and in the modern circumstances of urban traffic chaos. Some guidance may be found in a recent decision of the Divisional Court. S. left his car parked on the Victoria Embankment for five-and-a-quarter-hours and was prosecuted under the Construction and Use Regulations for causing an unnecessary obstruction. He was convicted and appealed on the grounds that as his car was one of a line he could not properly be said to be the cause of the obstruction. The appeal was dismissed.[11] Lord Goddard C.J. said that " the offence was not one of obstructing the highway but of causing unnecessary obstruction of the highway. He (his Lordship) failed to see that it could be said that a stationary car was not an obstruction. He could not walk or drive over the part of the highway where the car was. But such were the exigencies of modern life that it would not be said, if a car stopped for a few minutes, that an offence was committed." [11a] In the majority of cases that come before the courts, and probably in this case, some evidence is given that by reason of the presence of the defendant's car on the road there was only room for two lines of traffic where there would otherwise have been room for three or that by reason of the obstruction there was room for " one alternate " line only. On such evidence justices may nowadays and in present road conditions infer "that in the ordinary course persons may be obstructed." It is true that under the Town Police Clauses Act there has to be a "wilful" obstruction, but a man is presumed to intend the natural and probable consequences of his acts and it should not be difficult in a busy street to foresee consequences of this kind. It is most unlikely today that a defence that the defendant was having his lunch in a nearby café would succeed. On the other hand, if a motorist with a dangerously empty tank pulled up to have it filled at a roadside garage and stopped his car for a short time only, he might well be heard to say that if obstruction there was, it was necessary. The present position appears to be that the presence of a stationary vehicle on a busy town road is an obstruction, and that it is no defence to say that there is no proof that any particular person was obstructed or that other similarly stationary vehicles contributed to the obstruction. It would be a defence to prove that the use of the highway was, in all the circumstances, reasonable or that, if there was an obstruction, it was a necessary one. An ambulance driver parked for the purpose of taking an injured man to hospital or any other driver in a similar position should have no difficulty in making out such a defence.

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[10] *Gill* v. *Carson and Nield* [1917] 2 K.B. 674.

[11] *Solomon* v. *Durbridge*; *sub nom. Solomon* v. *Burbidge* [1956] Crim.L.R. 276.

[11a] *The Times*, January 27, 1956.

London Regulations

In 1956 a survey showed that at one moment there were parked in London some 39,000 stationary cars.[12] That is a measure of the problem which numerous regulations have attempted to solve. By section 10 of the London Traffic Act, 1924, the Minister of Transport was given power to make regulations governing places in streets where vehicles "may, or may not, wait either generally or at particular times." Parking in the London Traffic Area, which extends well into the Home Counties, is now controlled by a mass of regulations and orders. These may be divided conveniently into three categories: (a) those which provide for a total restriction on waiting during certain hours; (b) those which provide for unilateral waiting, and (c) those which control the use of specified parking places.

Restricted streets

By the London Traffic (Miscellaneous Provisions) Regulations, 1934–1956, a great number of the busier streets in the London Traffic Area are designated "restricted streets." It is ordered that no person (other than licensed street traders) shall cause or permit any vehicle to wait in any restricted street during certain prescribed hours (in general 11.30 a.m. till 6.30 p.m. on weekdays and in the City of London and in some other places 9 a.m. till 6.30 p.m. on weekdays) except for the purposes of (a) enabling any person to board or alight from the vehicle or to load thereon or unload therefrom his personal luggage, or (b) delivering or collecting goods, or loading or unloading the vehicle at premises situate within the street if it is not reasonably practicable to do so in any neighbouring street not being a restricted street. Loading operations may not take more than 20 minutes. Exceptions are made in respect of furniture deliveries and other similar and necessary occurrences and anything done after notice to, and with the permission of, the police. The essential ingredient of an offence under these regulations is that there should be a " waiting." There does not have to be an " obstruction." Under the Defence Regulations streets in which there was a total restriction on waiting during certain hours were indicated by a yellow band painted on the lamp posts. Highway authorities now have an option to retain the yellow bands, if they wish to do so, as a general indication to the public that waiting is restricted, but these markings no longer have any strict legal significance.

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[12] *Parking Survey of Inner London: interim report of committee*: see *The Times*, December 13, 1956.

There are few reported decisions on these regulations. Analogous provisions apply in Norwich to which there is an exception " to enable goods to be loaded or unloaded." A car owner parked his car outside a shop, went in and bought six champagne glasses and took them back to his car after having completed the purchase. He was convicted by the justices of a breach of the regulations made by the Norwich Corporation under the Road Traffic Act, 1930. He appealed on the grounds that he was " loading " goods onto his car. It was held that the exception, although not limited to goods vehicles, was intended to cover the loading of a vehicle for some commercial purpose. Lord Goddard C.J. said: " There may be many cases in which a motor-car would be used for something which it would not be reasonable for anybody to carry in his hand, for example, a piece of furniture . . . and I think that it might be said that if he was putting those things into the car . . . there was a loading . . . within the terms of the order." [13] The appeal was dismissed.

It is also an offence under these London Regulations to cause or permit any vehicle to be in any street within the London Traffic Area in such a condition or with such a load that it breaks down, but it is a defence to show that all reasonable steps have been taken to put and maintain the vehicle in a proper condition.

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[13] *Sprake* v. *Tester* [1955] Crim.L.R. 509.

Unilateral waiting

The London Traffic (Unilateral Waiting) Regulations, 1953–1956, make it an offence on specified lengths of road to wait on one or other side of the road according to whether the day of the month bears an even or odd number. The streets designated in the schedules to these regulations are not the main traffic arteries but are smaller streets. There are at present some seven different regulations in force covering different areas, applying at different times of day and allowing varying exceptions. A typical period of time during which waiting on the prescribed side is prohibited is from 11.30 a.m. till 6.30 p.m., though it is worthy of note that in some Soho streets unilateral waiting is in force throughout the 24 hours of the day and night. In general the time allowed in respect of any one period of waiting on the permitted side of the street is 30 minutes. Exceptions are made in respect of vehicles setting down and collecting passengers, but not in every specified street is there an exception to allow the loading and unloading of vehicles.

It would seem to follow logically from the impact of these regulations upon the general common and statute law that the mere fact that a vehicle is parked on the side of the street opposite that on which parking is prohibited does not of itself make the driver immune from a prosecution for obstruction or dangerous parking, if there are circumstances from which obstruction or danger could be inferred.

Parking places

The third series of regulations which stem from section 10 of the London Traffic Act, 1924, are the London Traffic (Parking Places) Consolidation Regulations, 1950–1956. These make it lawful to park in certain designated parking places. Unless otherwise specified a vehicle may only wait in such a place for a period of two hours at a time.

The Road Traffic Act, 1956,[14] envisages the provision of new parking places equipped with parking meters but this is a matter for future consideration.[15]

By and large it would be fair to sum the whole matter up by saying that a motorist who parks his car for more than a very short time in any busy street in any large town does so at his peril.

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[14] See [1956] Crim.L.R. 610, 765.

[15] See hereon the interim report referred to in note 12, above.

Summons and Charge Headings Relating to Parking

By A. E. Jones

The number of provisions relating to parking offences is considerable, and since many of these are only local in operation, it would be well-nigh impossible to prepare a comprehensive table of charges dealing with such offences. But there are certain general provisions and it may be of use to readers to have available some examples of suitable headings for summonses or charges under them. The following headings are designed to describe the specific offence charged and therefore the usual commencement which is set out in Form 2 in the Schedule to the Magistrates' Courts (Forms) Rules, 1952, is not included.

Unnecessary obstruction

Did cause [*or* permit] a motor vehicle [*or* trailer] of which you were [*or* —— was] in charge to stand on a road so as to cause unnecessary obstruction thereof contrary to regulations 89 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955.

Parking in a dangerous position

Did cause [*or* permit] a vehicle [*or* a trailer drawn by a vehicle] or which you were in charge to remain at rest on a road in such a position [*or* in such condition *or* in such circumstances] as to be likely to cause danger to other persons using the road contrary to section 50 of the Road Traffic Act, 1930.

Parking on a pedestrian crossing

Being the driver of a vehicle, caused the vehicle [*or* a part thereof] to stop within the limits of a crossing contrary to regulation 5 of the Pedestrian Crossings Regulations, 1954, and section 18 (8) of the Road Traffic Act, 1934, as amended by section 46 (4) of the Road Traffic Act, 1956.

Parking on the approach to a pedestrian crossing

Being the driver of a vehicle, caused the vehicle [*or* a part thereof] to stop on the carriageway between an uncontrolled crossing, the approach to which was indicated by a pattern of studs, and the line of studs in that pattern situate furthest from the crossing [*add except in case of one way street* on the side of the road on which that pattern was placed] contrary to regulation 6 of the Pedestrian Crossings Regulations, 1954, and section 18 (8) of the Road Traffic Act, 1934, as amended by section 46 (4) of the Road Traffic Act, 1956.

Regulations Under the London Traffic Act, 1924

Illegal parking in a restricted street

Did cause [*or* permit] a vehicle to wait in a restricted street during the prescribed hours contrary to the London Traffic (Miscellaneous Provisions) Regulations, 1951, as amended by the London Traffic (Miscellaneous Provisions) (Amendment) (No.) Regulations, 19 .

Illegal parking in a " unilateral waiting " street

At between and between the hours of and did cause [*or* permit] a vehicle to wait in a length of road specified in the column of the Schedule to the first undermentioned Regulations [*add as appropriate*—

(a) on the side of the road specified opposite that length of road in the column of the said Schedule

(b) for a longer period than minutes [*or* hours] (on the side of that length of road on which vehicles were not for the time being prohibited from waiting) [1]

(c) (on the side of that length of road on which vehicles were not for the time being prohibited from waiting) [1] when less than minutes [*or* hours] had elapsed since the termination during the said hours of the last period of waiting of the vehicle in that length of road [*or* on that side] contrary to the London Traffic (Unilateral Waiting) (No.) Regulations, 19 , as amended by the London Traffic (Unilateral Waiting) (No.) Regulations, 19 .]

In some cases alternatives (a), (b) and (c) will all have to be deleted. This is where a general prohibition exists against waiting on either side of the street, but an exception is made in favour of unilateral waiting for loading or unloading goods. Alternative (a) covers parking on the prohibited side of the street; alternatives (b) and (c) cover parking in excess of the permitted periods on the other side of the street.

Reference must be made to the wording of the relevant Regulations in order to fill up blanks and delete inappropriate words.

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[1] The words in round brackets are required in the case of breaches of some unilateral waiting regulations.

Medico-Legal Autopsy and the Recognition of Homicide *

By J. D. J. HAVARD, M.A., LL.B., M.B., B.CHIR.
Barrister-at-Law

The main purpose of a medico-legal investigative system is the prevention of the concealment of deaths from criminal violence. This purpose can be achieved only by a law of adequate scope, providing for the early notification and proper examination of all violent deaths, and of all sudden deaths of unexplained cause, in order that the precise cause of death may be established, and the possibility of homicide excluded. Such investigation is of considerable importance to the community in other respects in that it not infrequently demonstrates the existence of unsuspected industrial, domestic, or public health hazards, with the result that appropriate safety measures can be taken. Individual interests are also served, because the determination of the cause of death in a doubtful case will often save the deceased's relatives future difficulty over insurance or pension claims arising out of the death.

Homicide masquerading as natural death

The possibility of a homicide escaping recognition completely is usually considered the exclusive domain of the detective fiction writer and the cinema. It is usual to reassure ourselves that it can never happen in our own community, an illusion which is fortified by the high detection rate attributed to murder by the criminal statistics. Statistics, however, can relate only to recognised cases of crime, whereas the unique feature of homicide is the possibility of concealment. Moreover, the excessive publicity afforded to cases of lime burial, trunk murder, acid baths and other irregular methods of disposal, has obscured the fact that in a substantial number of cases an attempt is made to masquerade the incident as a natural death in order to dispose of the body through the normal channels. Indeed the many cases in which the murderer has already disposed of more than one victim in this way before suspicion has been aroused confirm that many such attempts must be completely successful in avoiding recognition. Few cases could, of course, rival that of Mary Cotten, who, in the space of a few years, disposed of her mother, three husbands, fifteen children, and a lodger before suspicion was aroused and an arrest made. On the other side of the Atlantic an insurance ring was uncovered in Philadelphia in 1939 as a result of which it was estimated that more than a hundred murders had escaped recognition: thirteen convictions were obtained. In the words of a recent American writer: "The planning of the murderer is most successful when situations are contrived which lead the casual or untrained to conclude that death resulted from natural causes. . . ." [1]

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* This article is based on an address given to the Essex, Norfolk and Suffolk Group Detectives' Conference at Gt. Yarmouth on June 6, 1956.

The importance of autopsy

It is now generally accepted that the most important single factor in the investigation of violent deaths, or of sudden deaths of unexplained cause, is the medico-legal autopsy. The fact that poison, or even external physical violence, can cause death without leaving any external signs, emphasises the dangers of arriving at an estimation of the cause of such deaths on the basis of the clinical history and external examination of the body alone. Spilsbury, whose views on such matters always merit careful consideration, stated of those districts where coroners arrive at inquest findings without recourse to autopsy, that "the whole proceedings are merely guess work." [2] Roche Lynch, a former Home Office analyst, stated that in eight of his cases of homicidal poisoning discovered only after exhumation of the body, the certifying doctor should have suspected poisoning in only one case.[3] All were sudden deaths disposed of as natural deaths without adequate examination. The importance of medico-legal autopsy in coroner cases has been repeatedly emphasised by recent workers in the United States. A survey of 500 consecutive coroner cases in San Francisco carried out in 1953 showed that even where doctors had been in attendance before death, estimation of the cause of death without the aid of autopsy carried an error in diagnosis of 45 per cent.[4] In another survey the following year [5] 232 coroner cases with no history and no external signs suggestive of violence were subjected to medico-legal autopsy. As a result eight of these deaths were shown to have been due to violence, which would not otherwise have been detected. Failure to carry out autopsy in the case of sudden death in children is particularly dangerous, and it is interesting to note that a survey of infant deaths in Newcastle in 1939 showed that about one-third of the deaths had been wrongly certified by the attending doctors.[6] The need for more routine recourse to autopsy in coroner cases has been officially recognised by the departmental committee on coroners of 1936 (Cmd. 5070, paras. 158 *et seq*.), and the inter-departmental committee on abortion ((1939), para. 141). The Coroners Society's recommendations on procedure (1953) advise coroners to order an autopsy whenever a death is sudden and the cause unknown (para. 45). Significantly the Registrar-General [7] has recently advocated more frequent recourse to autopsy in order to increase the accuracy of death certification.

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[1] Luongo (1952) *Health News* (New York), October 1952, p. 5.
[2] (1934) 2 *Med.-Leg.Crim.Rev.*, p. 69.
[3] (1942) 8 *ibid.*, p. 200.
[4] Turkel (1953) 153 *J.Amer.Med.Assn.*, p. 1087.
[5] (1955) 158 *ibid.*, p. 1486.

A measure of efficiency

Before assessing the efficiency of our own medico-legal investigative system it is necessary to understand the extent of the coroner's jurisdiction. This is dependent on receipt of information that the dead body of a person is lying within his district, and that there is reasonable cause to suspect that the person has died either a violent or an unnatural death, or a sudden death of which the cause is unknown (Coroners Act, 1887, s. 3 (1)). In addition the coroner has jurisdiction over all deaths of prisoners, foster children, lunatics, inebriates, etc., under certain circumstances, and various statutes provide that these additional cases shall be reported to him. In practice he will deal with a reported case in one of three ways. He may order an autopsy and dispose of the case with or without inquest, subject to the rule that he must hold an inquest in certain cases (Coroners (Amendment) Act, 1926, s. 21 (3)). He may hold an inquest without autopsy, or he may dispose of the case summarily without either inquest or autopsy, but with the exception of the additional statutory cases mentioned above, few cases are dealt with in this last fashion. Whichever course is adopted, it is clear from the evidence already adduced that the most important single factor in the investigation is the autopsy examination, and the use of autopsy in different jurisdictions therefore provides a useful measure of efficiency. The most reliable index is the proportion of medico-legal autopsies in a district expressed as a percentage of the total deaths. The reason for this is that a proportion of medico-legal autopsies to coroner cases fails to take into consideration certain factors, of which the possibility of a death requiring investigation not being reported to the coroner is the most important in the study of English jurisdictions. Defects in the law governing notification of the coroner are beyond the scope of this article, but it must be emphasised that English law is almost unique in placing no enforceable duty on doctors, nurses, undertakers and others to report deaths within the prescribed class (Coroners Act, 1887, s. 3 (1), *supra*) to the coroner. Unfortunately the system of death certification and registration, which exists properly for the purpose of providing statistical information, is unable to fill satisfactorily this serious defect in our safeguards against the concealment of homicide.

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[6] Spence (1941) *Lancet* i, p. 777.

[7] (1949) *Statistical Review (1940–1945)*, Text, Vol. I, Medical.

Table 1 (see p. 26, below) shows the English counties with respectively the highest and lowest autopsy percentages of total deaths.[8] The most significant feature of this table is the very wide variation shown between some of the counties: proportionately more than seven times the number of deaths appearing to require medico-legal autopsy in London as in Northumberland, and five times as many as in the case of Durham and other counties at the bottom of the table. It is impossible to explain so wide a variation on the basis of the different nature of the deaths occurring in the counties concerned. Indeed it might have been expected that Northumberland and Durham, with their mining and industrial districts, would have produced just as many deaths requiring medico-legal autopsy as other counties. Obviously variation in the proportion of total deaths reported to the coroner is an influential factor, but, as comparison of the figures for Durham and Gloucestershire, or in more rural areas, Buckingham and Wiltshire, shows, it is the proportion of medico-legal autopsies of cases actually reported to the coroner which is the most important feature. Table 2 lists the counties with respectively the highest and lowest autopsy rates on reported cases, and it is significant that the six counties at the bottom of Table 1 also appear in the seven counties at the bottom of Table 2. It is interesting to note also that these counties show a uniformly low autopsy rate on inquest cases, which by their nature, should require autopsy even more urgently than the normal run of reported cases.

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[8] The tables in this article have been calculated from figures given in the Home Office Returns of Coroners (1953) and the Registrar-General's uncorrected returns of total deaths (1953). Since coroners' jurisdictions do not infringe county boundaries except in three cases it is possible to correlate these figures at county level. Slight correction may be required as the coroner's territorial jurisdiction depends on the situation of the body, and not the place where death took place. Situations in which the body is found in a county different from that in which death is believed to have taken place are not common, and in most of these cases automatic correction of the figures will occur as the investigation is usually relegated to the coroner in whose jurisdiction the death took place (Coroners (Amendment) Act, 1926, s. 16 (1)). The fact that stillbirths are included in the coroners' returns and not in the Registrar-General's uncorrected returns also has to be taken into consideration but, again, the correction necessary is negligible.

Over-establishment of coroner jurisdictions

The autopsy rate on reported cases is, of course, entirely a matter of the individual practice of coroners in ordering autopsies, and it is possible to relate this practice with the experience of the coroners concerned. Clearly a coroner receiving relatively few cases reported to him annually can obtain little experience of the difficulties of dealing with medico-legal problems, and his coroner's duties take on the appearance of a part-time occupation. This is precisely what is happening in England today; in 1953 only 19 out of our 271 coroners were employed as full-time coroners while the remainder all carried out their duties as coroners as a spare-time occupation. Some idea of the anomalies under the existing establishment can be obtained by comparing the figures for 1953 for Middlesex and Lincolnshire. The former employed two full-time coroners who dealt with a total of 4,661 cases, while the latter employed fourteen part-time coroners to deal with a total of only just over 1,000 cases. Significantly London and Middlesex, the only counties to employ full-time coroners exclusively, are at the head of both tables 1 and 2. Table 3 has been calculated to show that the experience gained by coroners, represented by the number of cases reported to them annually, bears a direct relationship to their use of autopsy. The table also shows that few coroners receive enough cases to gain substantial experience. The dangers inherent in the existing establishment have been officially recognised for some time, and have received the attention of the departmental committees on coroners of 1936 (paras. 221 *et seq.*) and abortion of 1939 (para. 141); while more recently the Home Office has sent out a circular on the subject (52/1952) to local authorities in whose hands the appointments of coroners reside. Unfortunately the measures adopted to remedy the situation, namely the encouragement of local authorities to merge existing jurisdictions on coroners' retirements, are far too slow, and have resulted in a reduction in the total number of coroners by only thirty-eight in the last twenty years. It is necessary to think in terms of a reduction of at least another 200 before the maximum standards of efficiency can be reached. Moreover these figures do not take into consideration the numerous deputy and assistant deputy coroners who have been appointed.

Another feature which has been insufficiently appreciated is that the existence of multiple small jurisdictions makes access to the few large laboratories equipped to carry out specialised investigations very difficult, whereas the rapidly growing armament of forensic tests is making ready access essential if an efficient system is to be maintained.

The size of some of the American jurisdictions is immense by English standards. The New York Medical Examiner's Office receives about 16,000 cases annually, while the Los Angeles Coroner's office receives about 8,000. Of the 7,700 cases received by the Los Angeles office in 1949, toxicological analysis was carried out on 3,300, while about 1,800 blood alcohol estimations are carried out annually.[9] The San Francisco coroner has produced figures to show that more routine recourse to toxicological analysis has unearthed many previously unsuspected cases of barbiturate poisoning.[10]

One other feature of the multiple small jurisdictions is the effect they have on inquest procedure. Although most coroners carry out their inquests with tact and consideration, the relative freedom from the rules of evidence which they enjoy demands a high degree of judicial ability if justice is to be done, and seen to be done. This is difficult to achieve in the course of a part-time occupation, and the existing establishment is largely responsible for the recently publicised cases of apparent injustice occurring in coroners' courts. This has been seized upon as the main ground for abolishing the coroner's power of committal for homicide on inquisition, a move which is supported by a formidable body of legal opinion, and was recommended by the departmental committee on coroners of 1936 (paras. 94, 95). Unhappily, the unique difficulties of investigating homicide have been obscured in the process, and it has been overlooked that many convictions for murder, manslaughter and infanticide would never have been obtained if it had not been for the persistence of the coroner in pursuing his investigation. It is reasonable to suggest that much of the criticism of the coroner's power of committal would disappear if the multiple small jurisdictions were replaced by a few large ones under the control of highly qualified and experienced medico-legal officers with equivalent status, say, to recorders. One of the most attractive features of such a project would be that very little, if any, extra expenditure would be involved: the salaries (not including expenses) of the twenty-one Yorkshire coroners who dealt with 8,000 cases in 1953 amounted to £16,000. It will be seen also from table 3 that the less experienced coroners find it necessary to hold a far larger number of inquests in proportion to their reported cases.

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[9] Abernethy (1950) 4 *Ann.W.Med. & Surg.*, p. 472.
[10] Turkel (1953) *op. cit.*, p. 1090.

The quality of medico-legal autopsy

There is one important factor about which the statistics can tell us nothing, namely, the quality of the medico-legal autopsies. The very special features of these autopsies make it essential that they should be undertaken exclusively by pathologists experienced in medico-legal work. This principle of legal medicine has been recognised on the Continent ever since the thirteenth century when the statute law of the Italian States and the Stadtrechte of the North German towns insisted on special qualifications before a doctor could be regarded as proficient to give medico-legal testimony. Within a short time the principle spread over the rest of the Continent, with the exception of England where it is still the law that any registered medical practitioner can carry out a coroner's post-mortem, even though he may have no experience of medico-legal work. Twenty years ago the departmental committee on coroners of 1936 recommended (para. 165) that a panel of pathologists should be set up by the Home Office for the purpose of coroners' autopsies.[11] Three years later the departmental committee on abortion (1939), commenting on the need for autopsy by competent forensic pathologists, stated (para. 143) " that if this advice is carefully acted upon, there is every reason to anticipate that fewer crimes would remain undiscovered." More recently the Coroners Rules ((1953) S.I. 205) direct that " the post-mortem examination should be made, whenever practicable, by a pathologist with suitable qualifications and experience and having access to laboratory facilities " (rule 3 (*a*)). However, for reasons of establishment discussed above, it is often not practicable for this advice to be followed, and medico-legal autopsies are still carried out by general practitioners in many areas today, usually at the request of the part-time coroners. Any hopes that the legislature is sincere about enforcing this elementary principle of medico-legal investigation is dispelled by the survival on the Statute-book of a remarkable provision which empowers the coroner, *or his jury,* to order *any* registered practitioner to carry out an autopsy under pain of a fine. This provision first appeared in the historic Coroners Act of 1836, ss. 2, 6, which first made allowance for the payment of medical witnesses at coroners' inquests. At that time it was justified by the fact that England was several hundred years behind the rest of Europe in matters of legal medicine,[12] and the subject was only just beginning to be taught in our medical schools, with the result that one doctor would have been very much the same as another. Subsequently the rapid growth of our technical proficiency in forensic medicine has rendered the provision pointless, and even dangerous. Nevertheless, with characteristic indifference, the provision has been re-enacted parrot-wise ever since. It re-appeared in the Coroners Act of 1887, ss. 21 (3), 23, and was carefully preserved by the Coroners (Amendment) Act, 1926, s. 21 (1), notwithstanding an isolated bleat from the departmental committee on coroners of 1910 (Cd. 5004, para. 29), and, even more remarkable, was left untouched by the Coroners Act of 1954, a private Members' Bill, which dealt specifically with the subject of medical witnesses. The result of this curious survival is that the inexperienced practitioner, when requested by a coroner to carry out a post-mortem, is loth to refuse, even though he may recognise his limitations in medico-legal work.

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[11] The L.C.C. had set up a panel of pathologists to carry out coroners' autopsies more than fifty years ago (Minutes of L.C.C., October 30, 1906).

The results of inadequate or inefficient medico-legal autopsy on coroner cases do not make pleasant reading, for not only do criminals escape but the innocent may suffer. The medical press, to its credit, has always been the first to point out the dangers of such practice. There can be very few countries which tolerate medico-legal autopsies by inexpert practitioners, and most countries insist on certain qualifications and experience before such work is allowed to be carried out. Hence the Los Angeles autopsy surgeons must have an M.D. from an approved university, at least two years' experience in pathology, and are appointed only after a written and oral examination. Some idea of the reluctance with which the legislature has dealt with the problem in this country is shown by the fact that although the elementary requirement that all the cavities of the body should be opened at medico-legal autopsy was insisted upon by Bohn as long ago as 1689 in his classical monograph on the subject,[13] and was reiterated by Farr

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[12] The first recorded medico-legal autopsies were carried out at Bologna in 1302 and by the end of the fourteenth century there are frequent references to the practice. I can find no reference to coroners' post-mortems in England until the seventeenth century, and until 1836 it was quite exceptional for them to be carried out. Indeed Ryan (1832) *Manual of Medical Jurisprudence* (then a standard textbook), p. 299, considered it doubtful if a coroner had power to order an autopsy. It had, of course, always been a common law power of the coroner to order exhumation, but the subsequent examination was nearly always limited to an external view. Our first chair of Legal Medicine was not endowed until 1806 (Edinburgh) when the Crown commission observed that the subject was taught at every university of repute in Europe.

[13] *De Renunciatione Vulnerum*, Leipzig, pp. 7, 152.

(1787) [14] in his epitome of Faselii's work [15]—the first textbook of forensic medicine to appear in the English language—it was not until 1953 that it became obligatory in English coroner post-mortems. In that year the principle received oblique recognition by the inclusion in the Coroners Rules, 1953, of a form in the Schedule to be filled in by the pathologist, completion of which requires all the cavities of the body to have been opened.

The American Approach

The studied indifference shown in this country to the problem of homicide recognition bears a remarkable contrast to the attitude seen in the United States. Between thirteen and fourteen thousand murders are recognised there each year, representing one murder for every ten thousand living persons. It can be forecast that a quarter of a million persons alive in the United States today can expect to become victims of homicide.[16] It has been estimated in the press that about a thousand murders go unrecognised each year,[17] and there has been no authoritative denial of this. The existence of such figures, together with the opportunities for comparative work afforded by forty-eight different jurisdictions, has led to a far more realistic approach to the problem than is seen in England. Much useful information on the requirements of an efficient medico-legal investigative system has resulted from conferences between local and central government, medical, legal and other interests. The Model State Medico-legal Investigative System (1951), a joint report by the American Academy of Forensic Sciences, the American Bar Association, the American Judicature Society, the American Medical Association, and the National Civil Service and Municipal leagues, provides a good example. The report concluded (Part V, p. 39) that there are four requirements of a good local medico-legal investigative system: (1) a sufficient volume of cases to support a good technical staff; (2) an appointed chief of high technical qualifications remote from patronage pressures; (3) adequate command of adequate laboratory services; and (4) adequate authority and scope. With the exception of political independence few English jurisdictions come up to these requirements.[18] Just as telling were the conclusions reached by the

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[14] (1787) *Elements of Medical Jurisprudence*, London.

[15] (1767) *Elementa Medicinae Forensis*, Geneva.

[16] Ford (1950) 145 *J.Amer.Med.Assn.*, p. 1028; Regan (1950) 4 *Ann.W.Med. & Surg.*, p. 445.

[17] *Chicago Daily News*, August 9, 1954, col. I, and see Flynn (1955) 46 *J.Crim.L. & Criminology*, p. 2.

[18] According to the latest information substantial compliance with the Model Law exists in at least nine States, and in many individual counties of other States.

National Conference of Commissioners on Uniform State Laws in their Model Post-Mortem Examinations Act (1954): " It is basic to any properly organised medico-legal investigative system that the head of the office be a person of the highest mental and moral calibre with the best obtainable professional training in medicine and pathology, devoting full time to his duties and dedicated to the discreet and wholly impartial acquisition of post-mortem evidence. Whenever possible, he and his principal assistants should keep abreast of medical advances by affiliation with medical schools and should, to the extent of their abilities, aid in the development of their professional field by contributions to medical literature and by teaching medical and law students in their special medico-legal field " (Rp. 5, s. 2, Comment).

The English Approach

Compared with these far-reaching and constructive recommendations, our own efforts in this field are not impressive. Not only have the principles of efficient medico-legal investigation been incompletely understood at administrative level but no attempt seems to have been made to learn from the experience of other countries. The departmental committee on coroners of 1936, having levelled a formidable attack on the coroner system, made only one reference to the medical examiner system and that was to say: " We have no evidence of how this system has worked." Since this system formed the only rational alternative to the coroner system, and was reflected, perhaps unconsciously, in many of the committee's own recommendations, it seems that the committee might at least have made some inquiries on the matter. Even more typical was the remarkable recommendation of the interdepartmental committee on cremation ((1950) Cmd. 8009, para. 46) that post-mortem should no longer be required prior to cremation in cases where the two doctors were unable to agree as to the cause of death, providing " there is no reason to believe that the death may have been due to poison, to violence, or to any illegal operation, or to privation or neglect." The committee further criticised the medical referees for ordering post-mortem too freely. This unfortunate recommendation has been aptly criticised elsewhere.[19] It only remains to point out that it is most unlikely that no evidence was placed before the committee as to the danger of omitting post-mortem in such cases. In this respect the fact that departmental committees are no longer obliged, or even encouraged, to print their minutes of evidence is to be deplored.

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[19] Polson *et al.* (1953) *The Disposal of the Dead*, pp. 34, 108.

In the case of the more obstructive recommendations of the nineteenth century committees on medico-legal matters, the medical profession can preserve a clean sheet by pointing to the evidence which it gave before the Committees and which was ignored. Now posterity can judge us on the recommendation alone. Fortunately the legislature did not incorporate the recommendation in the Cremation Regulations, 1952 (S.I. No. 1568) which followed the committee's report.

Conclusions

Leaving aside the important question of adequate legal enforcement of the notification of deaths to the coroner, a problem which requires separate treatment, it is clear that the worst defects in our existing medico-legal investigative system can be traced ultimately to the antiquated establishment of coroner jurisdictions, which, in the words of a recent Home Office circular (52/1952) " have survived from times when their limits were dictated by means of travel which have since greatly changed." The coroner's office was instituted in the twelfth century for a very different purpose from that which it serves today. Indeed the concept of the coroner's investigation as a medico-legal investigation proper is recent history. There existed no provision for payment of medical witnesses at inquests until 1836, and it was not until a generation later that the coroner was entirely free to call medical evidence at his discretion (Coroners Act, 1860). The re-organisation of the establishment necessary for the coroner system to carry out its new purpose efficiently is long overdue; meanwhile subdivisions and restrictions on jurisdictions such as under the Coroners Act of 1844 have only aggravated the position. Finally the survival of certain feudal incidents such as the requirement that the coroner must personally view the body, and which can serve no useful purpose under modern conditions, provide additional obstruction to the necessary reform in establishment.

If it was considered a " disgrace " that in the nineteenth century Brunner, " a learned German, in search of primitive (and indeed prehistoric) law, should find it perambulating in Lincoln's Inn in the forty-second year of Victoria like a zombie—completely dead, yet capable of causing endless trouble. . . ." then how much more of a disgrace is it that our medico-legal investigative system should, in the twentieth century, stagger under the burden of a feudal establishment and medieval institutions, which ought long ago to have been relegated to the province of legal history. Meanwhile, as a result of the inadequate investigation of sudden death in many districts, there is being perpetuated a process of guesswork which has gone on for more than 800 years.

Tables

TABLE 1

ENGLISH COUNTIES WITH HIGHEST AND LOWEST AUTOPSY RATES ON TOTAL DEATHS, 1953

	County	*Autopsy rate on total deaths in county* %	*Reported (i.e., coroners') cases as percentage of total deaths*	*Total No. of deaths*
1	London	25	27·5	41,713
2	Middlesex	21	22·5	20,713
3	Surrey	17	24	18,671
4	Essex	16	21	21,484
5	Gloucestershire	12	16	10,929
6	Rutland	12	16	206
7	Kent	11	16·5	18,030
8	Hertfordshire	11	23	7,120
9	Buckinghamshire	10·5	16	3,593
36	Durham	5	16	15,882
37	Northamptonshire	5	15·5	5,315
38	Shropshire	5	14	3,232
39	Wiltshire	4·5	18	4,036
40	Huntingdonshire	4	12	678
41	Northumberland	3	13·5	9,475

TABLE 2

ENGLISH COUNTIES WITH HIGHEST AND LOWEST AUTOPSY RATES ON REPORTED (I.E., CORONERS') CASES, 1953

County	*Autopsy rate on reported cases* %	*Autopsy rate on inquest cases* %	*Total No. of reported cases*
1 Middlesex	93	100	4,661
2 London	91	99·5	11,497
3 Essex	78	91	4,524
4 Gloucestershire	78	76	1,702
5 Rutland	76	61·5	33
6 Oxfordshire	71	78	457
7 Surrey	70	97	4,465
35 Shropshire	37	35	460
36 Huntingdonshire	36	14	83
37 Norfolk	36	24	991
38 Durham	34·5	39·5	2,488
39 Northamptonshire	33	28	798
40 Wiltshire	25	31	724
41 Northumberland	24	27	1,275

TABLE 3

AUTOPSY AND INQUEST RATES OF CORONERS RELATED TO NUMBER OF CASES RECEIVED, ENGLAND AND WALES, 1953

No. of cases reported to coroner	*No. of coroners receiving this no.*	*Autopsy rate on reported cases* %	*Inquest rate on reported cases* %	*Autopsy rate on inquest cases* %
over 3,500	1	81	12	100
2,500–3,000	2	94	15	99
2,000–2,500	4	85	20	84
1,500–2,000	5	67	18	88
1,000–1,500	6	71	29	74
500–1,000	25	57	35	58
300–500	36	59	34	60
200–300	41	55	32	52
100–200	56	53	36·5	53
under 100	95	52	41	42

Larceny by a Trick and Contract

By Wing Commander J. T. Lowe, LL.B., *Barrister-at-Law*

The case of *Du Jardin* v. *Beadman Brothers, Ltd.* [1952] 2 Q.B. 712, has set at rest, for the time being at any rate, one of the most perplexing problems in the modern law, namely, whether larceny by a trick negatives for the purposes of sections 2 (1) and 9 of the Factors Act, 1889, the consent of the owner who has entrusted goods to a mercantile agent.

It will be remembered that in this case one G. offered to buy a Standard motor-car from a company for £710. He said that he had a prospective customer for it, and in order to obtain possession of the car he paid the company £10 in cash and gave them a cheque for the balance. He also left his Hillman car as a security pending the clearance of the cheque, and it was agreed that the property in the Standard car should not pass until the cheque was cleared. Later that day, unknown to the company, G. resumed possession of the Hillman car, and in breach of an express condition that the Standard car should not be disposed of until the cheque was cleared[1] G. sold it and appropriated the proceeds. The cheque was worthless, and G. was convicted of larceny by a trick.

The police took possession of the Standard car, and the company issued a summons under the Police (Property) Act, 1897, claiming the car, and the purchaser of the car issued a cross-summons also claiming the car. The magistrates ordered the return of the car to the company. The purchaser thereupon issued a writ against the company alleging detinue and conversion.

Construing section 9 of the Factors Act, 1889, Sellers J. ruled that the purchaser, who had acted in good faith, had acquired a good title to the car on the ground that G., the buyer from the company, was in possession with the consent of the company. In arriving at this decision the trial judge was influenced by the dicta of Scrutton L.J. and Bankes L.J. in the case of *Folkes* v. *King* [1923] 1 K.B. 282, and the dicta of Denning L.J. and Somervell L.J. in the case of *Pearson* v. *Rose & Young, Ltd.* [1951] 1 K.B. 275. He also indicated that the common law doctrine of larceny by a trick was based on a fiction, and accepted the criticism of *R.* v. *Pear* (1779) 1 Leach 212, at pp. 1084–1087 in Russell on *Crime*, 10th ed., as valid.

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[1] This was, of course, important, since otherwise the case would have been one of obtaining the car by false pretences.

The case of R. v. *Pear*

In *R.* v. *Pear*, one Pear on July 2, 1779, hired a mare from one Finch, who lived in London, Pear stating that he required the mare in order to make a journey to Sutton in Surrey. It was agreed that the mare should be returned at eight o'clock on the same evening. Finch, before he hired out the mare inquired of Pear where he lived and Pear gave a false address. The owner then delivered the mare to Pear, who did not return with her as promised; in fact he sold her on the same afternoon in Smithfield. Pear was later apprehended and indicted for larceny of the mare. He was convicted, and his conviction was later upheld after a debate of eleven judges in the house of Lord Chief Justice De Grey.

In his direction to the jury Ashhurst J. was reported to have said that if they, the jury, were of the opinion that the prisoner hired the mare with the intention of taking the journey and afterwards changed his mind, then as she was sold whilst the privity of contract subsisted they ought to acquit him. But if they were of the opinion that the journey was a mere pretence to get the mare into his possession, and that he hired her with the intention of stealing her, then they ought to find him guilty.

This direction is somewhat remarkable, because the only point upon which the attention of the jury was focused was the time of formation of the prisoner's intent. The jury were, in effect, told that if, when the prisoner acquired possession, he had the *animus furandi*, he was guilty of stealing. Not one word is mentioned of the other cardinal elements of larceny, the *cepit*, the lack of consent of the owner. On the face of it the fundamental requirement of larceny, a taking *invito domino*, was totally eclipsed, and a new crime had been manufactured, namely, larceny without trespass.

Now it can hardly be supposed that the trial judge was prepared to lay down that larceny did not require trespass. Such a proposition would have been as revolutionary, for example, as the proposition that murder did not require malice aforethought. If then he was fully conscious of this essential element one can only assume that he considered there was a trespassory taking out of possession, if at the time possession was delivered the prisoner had formed the *animus furandi*.

The alleged fallacy

It has been contended that in approaching the problem in this manner Ashhurst J. was guilty of a fallacy, for he was saying that whether the prosecutor consented to possession was to be determined not by reference to his, the prosecutor's, state of mind but the state of mind of the thief.

Exactly the same kind of problem arises, of course, in the case of larceny by a mistake, and the objection to this line of reasoning was put by Bramwell B. nearly a hundred years later in the famous case of *R.* v. *Middleton* (1873) 12 Cox 417, in the following words:—

> "This matter may be tested in this way. A tells B he has ordered a wine merchant to give B a dozen of wine. B goes to the wine merchant, bona fide receives and drinks a dozen of wine. After it is consumed the wine merchant discovers he gave B the wrong dozen and demands it of B, who, having consumed it, cannot return it. It is clear the wine merchant can maintain no action against B, as B could plead the wine merchant's leave and licence. But it is said that if B knew of the mistake, and took the wine *animo furandi*, then he would have taken it *invito domino*. So that whether the *dominus* is *invitus* or not depends, not on the state of his own mind but on that of B."[2]

Similarly, in the case of *Folkes* v. *King*, Bankes L.J. said at p. 297:

> "To establish a consent it is no doubt necessary to consider what the state of mind of the owner of the goods was with reference to the possession of them by the mercantile agent. I fail to see how for this purpose or for any purpose of applying the section, it can be material to look into the mind of the mercantile agent."

Notwithstanding these criticisms let us endeavour to assess precisely the two alternatives which Ashhurst J. placed before the jury.

Innocent possession

The first part of the direction is clear enough. If Pear was, indeed, a genuine bailee then he had acquired an innocent possession. The prosecutor had intended to grant and Pear to receive possession of the mare for a limited period. Pear had become an innocent possessor, and such being the case there could be no question of trespass. Pear having acquired an innocent possession was placed once and for all outside the common law doctrine of larceny, and a subsequent dishonest appropriation of the mare was not sufficient for a conviction.

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[2] It need scarcely be pointed out that this passage itself is fallacious, since it confuses an apparent intention with the real intention. So far as the knowledge of the doer does not extend to any material circumstance of the act the act as to that circumstance is unintentional. Since the wine merchant's knowledge did not extend to the circumstance that the bottles contained wine of a different quality his act in handing over the actual bottles must be classed as an unintentional act.

In *Middleton's* case although the apparent intention of the clerk was to hand over to Middleton £8 16s. 10d. her knowledge did not extend to the circumstance that the prisoner was entitled to withdraw only 10s., and her act in handing over the actual sum which she did must therefore be classed as an unintentional act. To maintain that she consented to hand over £8 16s. 10d. would make her guilty of stealing this sum from the Postmaster General which is absurd.

As far as the prisoner was concerned he knew when the money was placed on the counter that he had no right to the possession of it, and when he took it up he was not an innocent possessor at all.

But the question of an innocent possession was to be determined by what the prisoner contemplated in his own mind. Did he contemplate the acquisition of an innocent possession or did he contemplate depriving the prosecutor of his property in the mare? If that indeed was his state of mind then the question of a bailment could be disregarded altogther for the prisoner never came within the rule of innocent possession at all.

The law of larceny from the earliest times had excluded the case of the innocent possessor. He was excluded because of the requirement of trespass. As to who, in fact, was an innocent possessor was not indeed settled until the case of *R.* v. *Pear*.

Who, in fact, is an innocent possessor? Clearly he is an innocent possessor who, holding possession with the consent of the true owner, intends *at the time of receipt* to redeliver the thing entrusted to him when his possessory right is terminated. This conception was reached in the law of larceny by finding at a very early date. Thus as early as 1467 (Y.B. 7 Edw. 4, Pasch.pl. 9) it was settled that the loser of a thing impliedly consented to the finder taking possession with the honest intention of restoring it. If, therefore, knowing who the owner was, or believing that the owner could be discovered, the finder took it into his possession with the intention of restoring it, the finder acquired an innocent possession, and a subsequent fraudulent appropriation of the thing was no larceny. If, however, the finder on taking the thing into his possession with the like knowledge or belief, immediately formed the *animus furandi* he was guilty of a trespassory taking and of larceny. This early rule was plain common sense, for whilst the owner could reasonably be deemed to have consented to the finder acquiring an innocent possession, he certainly could not be deemed to have consented to the thing being taken into possession *animo furandi*. To imply consent in such a case would be to imply that the owner had consented to the theft of his own goods.

Curiously enough this eminently sane rule made no headway at all in the case of bailments. The judges were obsessed with the rudimentary idea of a trespass *vi et armis*. They insisted on *cepit*.

Thus Coke writes: "Secondly, it must be an actual taking: for an indictment '*quod felonice abduxit equum,*' is not good because it wanteth *cepit.*[2a] By taking, and not bailment or delivery, for that is a receipt, and not a taking: and therewith agreeth Glanvil. *Furtum non est ubi initium habet detentionis per dominum rei*" (Coke Inst. III, c. 47).

The plain fact of the matter was that the judges in the case of bailments never addressed their minds at all to what the bailor in reality consented. Plainly it was insufficient to say that the bailor consented to possession; what, in fact, he was transferring was an innocent possession in the sense described above. He was transferring "immediate possession to a person who claimed the thing for himself until some time had elapsed or some condition had been fulfilled, but who acknowledged the title of the bailor for or on whose behalf he held it, and who was prepared to relinquish the thing when his own temporary claim to possession had come to an end."[3] If the judges had seen that they would not have been obliged to resort to the ridiculous doctrine of breaking bulk, a doctrine devoid of all reason and common sense. They would have seen that to insist that it was a delivery and not a taking where the bailor had delivered the thing to a pseudo bailee who had the *animus furandi* from the beginning was to insist that the bailor had consented to the theft of his own goods.

The true basis upon which the *Carrier's Case* (1473) Y.B. 13 Edw. 4, fo. 9 Pasch.pl. 5,[3a] could have been rightly decided was indicated in the case itself. For some reason which it is difficult to understand the logical *ratio decidendi* was not accepted by the judges who adopted the breaking bulk doctrine. By refusing to recognise the true principle they placed the law of larceny in a state of stagnation for three hundred years.

The true view was placed before the court by Vavisour who said:—

> "Sir, it seems to me that our case is better than that of a bailment. For here the goods were not delivered to him; but there was a bargain that he should carry them to Southampton. . . . And then, if he took them to carry them thither, he would take them warrantably. But, according to the case here set forth, his subsequent demeanour shows that he took them as a felon and with an intent other than that of carrying them. . . .

[2a] Both *abduxit* and *cepit* can mean "he took away," but *cepit* bears the implication that the object was seized against the will of the owner which *abduxit* does not.

[3] In other words he was transferring immediate possession whilst retaining mediate possession. See Salmond on *Jurisprudence*, 10th ed., at p. 301.

[3a] See Turner and Armitage, *Cases on the Criminal Law*, 221.

> And, in that case, he took them without warrant and cause; for he did not pursue his cause, and so it is felony."

Adopting this argument Laken J. (K.B.) said:—

> "There seems to me a difference between a bailment of goods and a bargain to take and carry them. For by the bailment possession is delivered; but by the bargain he [the carrier] has not possession until he takes them, etc. And if he takes them to carry, then it is lawful, etc., but if he takes them with another intent than to carry them, so that he does not pursue the cause, then it seems to me that this may well enough be called felony."

Here is the doctrine of innocent possession expressed in the plainest terms. If the bailee enters upon the bailment to carry then he is an innocent possessor, but if he takes the goods with another intent then he is taking them feloniously. This is not a denial of bailment but a pronouncement upon its true scope and purpose. It means that the nature of the bailor's consent has been precisely defined, for his consent is to the pursuance of the cause, *i.e.*, the creation of an innocent possession. Once that has *begun* the bailee is immune, for the bailor is then bound by his consent. But if there is no pursuance of the cause then there is no consent, for, in truth, the bailment has never begun. To imply consent in such a case is to imply that the bailor has consented to the theft of his own goods. As for the bailee he cannot plead the defence of bailment, since in fact he never took the goods in lawful bailment; he took them as a felon.

It has been said that the most rational contribution to the case was that of Brian C.J. (C.P.). What, in fact, did he say? He said:—

> "It seems to me that it is all one, a bargain to carry them or a bailment of them. For in both cases he has authority from the very person in whom the property is, so that it cannot be called felony. In Michaelmas term 2 Edw. 3, an indictment '*quod felonice abduxit unum equum*' was held bad, for it should have been '*cepit.*' . . . And in this case the taking cannot be felonious, for he had lawful possession, so that the breaking of the bales is no felony."

Here is no attempt to analyse what he means by the word "authority," nor does he attempt to explain what he means by lawful possession. He appears to be obsessed by the requirement of "*cepit.*" To him delivery to a genuine bailee and delivery to a pseudo bailee meant one and the same thing. What he was not prepared to admit was that there was any distinction between the possession of an innocent bailee and the possession of a person who, in the moment of receipt, usurped the entire dominion. The bailor's consent applied equally to both. Sheltering, therefore, under the formalism of *cepit* the possession of the knave was as good as that of the bailee who pursued his cause. Both were without guilt in the eyes of the common law.

Having thrown overboard the logical *ratio decidendi* of the *Carrier's* case what then was left to the criminal judges? They were left with the grotesque doctrine of breaking bulk and the narrow conception of *cepit*. Now obviously the Bench was faced by the fact that it was just as easy to deprive honest persons of their goods under the guise of a receipt as it was under pure *cepit*. Thus they were forced to take refuge in the bare custody principle, and to apply it to cases where, *animo furandi*, the prisoner had, in fact, obtained possession.

This bare custody principle applied strictly to cases where the thing was delivered for a special purpose, but was intended to remain in the presence of the owner. In such cases the owner could not be said to have reposed confidence in or to give credit to the persons in whose hands he placed it, and since the thing was in his presence his dominion over it was as perfect as before (2 East P.C. 683–684). The extension of this principle, however, naturally entailed the moving away of the judges from the narrow conception of *cepit*. Clearly in the bare custody cases the taking was, in fact, a receipt, and *cepit* was a fiction. There was an increasing tendency to concentrate more and more on the intent of the prisoner and less and less upon the precise method of acquisition. With increasing clearness it began to be seen that the whole transaction might be viewed as a unity with no precise lines of demarcation. Thus we meet such phrases as " intention to take the goods feloniously " *R.* v. *Chisser* (1678) T.Raym. 275 ; " an original and preconcerted design " *R.* v. *Sharpless & Greatrix* (1772) 1 Leach 92. There was an awakening to the fact that a taking might occur not only by *cepit* but by a fraudulent receipt. The time of the formation of the *animus furandi* became all important, for if, indeed, it existed from the beginning then, in reality, whether it was a taking or whether it was a receipt was immaterial, for there was no moment when any possession could vest. The true larceny by a trick was born before *R.* v. *Pear*.[4]

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[4] Thus the case of *R.* v. *Sharpless and Greatrix* quoted above is generally referred to as a case of larceny by a trick. (See, *e.g.*, Archbold, 33rd ed., at p. 550.)

The logic of R. v. *Pear*

At the date of *R.* v. *Pear* a bailee who disposed of the entire subject-matter of the bailment without breaking bulk was not guilty of larceny. A contract of bailment was the entrance door to an immunity from what was nothing more than plain stealing. A rogue could enter upon a preconcerted design to usurp the entire dominion in a thing, provided he induced the owner to part with possession.

In pleading immunity after his depredation the rogue would be barefacedly relying on the law; he would plead the fact that the owner consented to the transfer of possession. The magic name of a bailment would secure his release. In *R.* v. *Pear* the nature of the immunity afforded by a contract of bailment was properly explored, and it was explored by ascertaining precisely to what the prosecutor consented. In truth *R.* v. *Pear* did nothing more than to apply the logical *ratio decidendi* of the *Carrier's* case.

To what, in fact, did the prosecutor consent? He consented to privity of contract, to the creation of a genuine bailment. That is only saying in another way that he consented to the pursuance of the cause. Did then the prisoner pursue the cause; had he the genuine intention of a bailee? If he did then he had acquired an innocent possession, and it was patently that to which the prosecutor had consented. If it may be permitted to use a convenient *facon de parler*, the bailee's estate had vested, and once the estate had vested the prisoner was immune. Such was the first limb of the direction.

The second limb addresses itself to the question as to whether, in fact, an innocent possession was created by a genuine contract of bailment. As to this point the prisoner's state of mind must be the sole criterion. Did he in truth receive an innocent possession or did he, in fact, at the time of receipt take under the guise of a bailment that which the prosecutor never intended to give, namely, an entire dominion? If he did then he was never an innocent possessor at all; but was guilty of larceny. He was no more entitled to rely upon a bailment than a thief who clandestinely took the horse out of the stable, for he was using a bailment as a cloak for his own rascality.

Such was the reasoning in *R.* v. *Pear*: it distinguished between the innocent possessor and the rogue. It may be said that this reasoning is faulty or "shallow sophistry." To support this contention it may be argued that the distinction drawn between possession and innocent possession is meaningless, and that the possession granted to a person who receives *animo furandi* is no different from the possession granted to the genuine bailee, for both receive possession. The answer to this is obvious for, if the consent of the prosecutor is held to apply to both equally without distinction, then one cannot escape the conclusion that in the case of a person who receives *animo furandi* the prosecutor has consented to the theft of his own goods.

In the case of *Lake* v. *Simmons* [1927] A.C. 487 Lord Sumner said:—

> "I do not think the doctrine [*i.e.*, the doctrine in *Pear's* case] ever was one, which could be described as being an artificial view of the facts as opposed to the actual facts of the case. It was not merely 'invented by judges' to prevent a thief from taking advantage of his own wrong and relying upon a possession which he obtained unlawfully. Before this 'invention' an accused person, who contended that there was no sufficient evidence of a taking, was not relying on a possession unlawfully obtained; he was relying on the law and was taking proper advantage—if that is the word—of being in the right."

How, it may be asked, could Pear rely on the defence that he was in the right, *i.e.*, was an innocent possessor under a contract of bailment before he sold the mare, when, on the evidence, he had the *animus furandi* from the beginning?

(*To be concluded*)

The Convicted Man and Jury Service

By Ronald P. Crompton, M.A.(Oxon.)
Deputy Town Clerk of the Borough of Gillingham

The expression " trial by peers " might have assumed an unusual significance in the twentieth century because alleged wrongdoers might conceivably be tried by a jury comprising one or more convicted men. Whether men who have been convicted should automatically be excluded from jury service is a matter of opinion. Some may view the casual offender as not disqualified, but not desire the habitual offenders to be liable to serve. The Lord Chief Justice in the case of *R.* v. *Kelly* [1950] 2 K.B. 164, at 175 said: " and, whatever may have been the position in the time of Hale C.J., it would indeed be disastrous if we were now obliged to hold that a conviction for a petty crime, technically a felony, conferred disqualification for life on the offender who might have escaped with no more than a nominal penalty." However that might be, the present position in relation to jury service by convicted men is by no means clear or intelligible.

Section 10 of the Juries Act, 1870, provides that " no man who has been or shall be attainted of any treason or felony, or convicted of any crime that is infamous, unless he shall have obtained a free pardon, nor any man who is under outlawry, is or shall be qualified to serve on juries . . . in any court or on any occasion whatsoever." The effect of the Forfeiture Act, 1870, which came into operation on July 4 of that year was to abolish attainder except in relation to those attainted at the time the Act was passed. From this it is clear that in view of the word " shall " in section 10 no person would be disqualified under that section because they were attainted of treason or felony. Outlawry proceedings were abolished under section 12 of the Administration of Justice (Miscellaneous Provisions) Act, 1938. The reference to infamous crime was limited to offences of buggery and assaults, solicitations, permissions, promises, threats made in order to induce the commission of or permission for this crime by a definition in section 46 of the Larceny Act, 1861. This section has now been repealed and replaced by section 29 (3) of the Larceny Act, 1916, but the definition of " infamous crime " does not reappear. There seems some doubt as to whether a man who has served sentence is deemed to have received a free pardon in view of the fact that the Civil Rights of Convicts Act, 1828, s. 3, provides that every punishment for felony once endured shall have the effect of a pardon under the Great Seal, but the better view appears to be that a free pardon implies an actual pardon.

From what has been said it would appear that the only disqualification from jury service is a conviction for an infamous crime. This position raises certain difficulties. When the lists are being prepared an opportunity is given for those who are disqualified to raise objections. If the convicted man objects then it would appear that the local authority have to make searching questions as to his offence to ensure before refusing his application that he has not been convicted of an offence relating to buggery. If he does not object to jury service then even if he is disqualified section 2 of the Juries Act, 1922, provides: " Every person whose name is included in the jurors book as a juror . . . shall be liable to serve as such, notwithstanding that he may have been entitled by reason of some disqualification or exemption to claim that he ought not to be marked in the electors list as a juror."

The prisoner has the opportunity of challenging either peremptorily or for cause at his trial. It would appear a possible ground for objection to a juryman that he had been convicted. The difficulties are stated in *R.* v. *Kelly* at p. 173 to be these: " This right remains unaffected; but it is asked, how could he challenge if he did not know? "

The question then arises whether the prisoner after conviction can complain that a member of the jury had been disqualified. In *R.* v. *Kelly* the prisoner sought a new trial because some five years previously a member of the jury had been convicted of the felony of receiving stolen goods and sentenced to one month's imprisonment. A new trial was refused. It was pointed out that apart from an indication by Lord Atkin in *Ras Behari Lal* v. *The Queen* (1933) 102 L.J.P.C. 144, a case before the Judicial Committee of the Privy Council not binding on other courts, that if an objection to a juror was not known at the time of the trial but arose afterwards the court would interfere, no case was known where the disqualification of a juror not noticed at the trial would necessitate a new trial. *R.* v. *Tremearne* (1826) 5 B. & C. 254, *R.* v. *Mellor* (1858) Dears. & B. 468, and *R.* v. *Wakefield* [1918] 1 K.B. 216, were distinguished because in these cases there was personation of a juryman.

From these facts certain practical difficulties can be seen. The local authority have to delve into the past of applicants for exemption even though they may have been guilty of even the smallest offence on the offchance that they might have been convicted of infamous practices. There are, unexpected though it may be, a considerable number of applications for exemption from ex-convicts. The present section 10 of the Juries Act, 1870, is largely antiquated. There is need of revision either to remove the disqualification or to establish clearly a distinction between those who are disqualified and those who are not.

Dealers in Old Metal

By J. F. Garner, LL.M.,
Clerk of the Peace to the Borough of Andover

The law relating to the control of dealings in old metal seem somewhat unnecessarily complicated; admittedly detailed provisions are necessary (especially at the present time) to keep a check on the activities of receivers and others dealing in such valuable commodities so easily stolen, but is it really essential that those provisions should be quite so involved?

Apart from the ordinary law of the Larceny Act, 1916, the following statutes deal with the subject:

(a) *Public Health Acts Amendment Act*, 1907, *s.* 86

Under this section every person carrying on business as a dealer in old metal (an expression which is not here defined) or as a marine store dealer, must register his name, residence and place of business with the local authority, and keep proper books recording all transactions. Proceedings under this essentially "police" control may be taken only by the local authority (except with the consent of the Attorney-General): Public Health Act, 1875, s. 253, applied by section 6 of the Act of 1907. In any such proceedings it will have to be proved that the section is in force in the district, as this section of the Act is an adoptive one (see sections 2 and 3). Powers are given to officers authorised by the local authority to enter and inspect registered premises; this is customarily carried out by police officers, but it should be remembered that their powers are derived from the local authority, and consequently periodical checks should be made to ensure that the officers executing these duties at a particular station or in a particular police division, are in fact the ones authorised by the local authority (see s. 86 (4)).

(b) *Old Metal Dealers Act,* 1861

This statute is now virtually obsolete (except where the 1907 Act has not been adopted) as it requires the registration of a dealer in old metals on a justices' order, if he has been convicted of being in possession of stolen metals. "Dealer in old metals" is defined in section 3 as meaning "any person dealing in, buying, and selling old metal, scrap metal, broken metal or partly manufactured metal goods, or defaced or old metal goods, and whether such person deals in such articles only, or together with secondhand goods or marine stores." As mentioned above, this definition does not apply to the 1907 Act, but as the two statutes seem to be *in pari materia*, it is submitted that the 1861 Act definition could be used in any case of difficulty arising under the 1907 Act. This, and the other provisions hereafter discussed, is enforceable by the police in the ordinary way, without recourse to the local authority.

(c) *Prevention of Crimes Act*, 1871, *s.* 13

In this section, a dealer in old metals (defined as in the 1861 Act) is prohibited from purchasing, receiving or bargaining for any metal (new or old) mentioned in the Schedule in any quantity at one time of less weight than that specified in the Schedule. Thus, lead may not be sold in quantities of less than 1 cwt. at a time, or copper, brass, tin, pewter or german silver in quantities of less than 56 lbs. at a time.

(d) *Children and Young Persons Act*, 1933, *s.* 9

Under this section, a dealer in old metal as defined in the Prevention of Crimes Act, 1871, may not purchase from any person apparently under the age of sixteen, any old metal, whether offered for sale by that person on his own behalf or on behalf of any other person. "Apparently" does not seem to have been considered by the courts in this context, but it is submitted that the court would be entitled to consider whether, seeing the young person for themselves, the accused had come to a reasonable conclusion in deciding that he was not under sixteen. "Old metals" are defined in the section as including "scrap metal, broken metal, or partly manufactured metal goods, and old or defaced metal goods."

(e) *Marine store dealers*

Marine store dealers are also dealt with in sections 538–542 of the Merchant Shipping Act, 1894. These provisions require a marine store dealer to have his name and trade painted on his shop, to keep proper books, not to purchase from persons under the age of sixteen, not to cut up cables exceeding 5 fathoms in length without a justice's permit, and to advertise the fact of his having obtained such a permit. "Marine store dealer" is defined as being any person "dealing in, buying, or selling, any of the articles following, that is to say, anchors, cables, sails, old junk or old iron, or other marine stores of any kind"; this definition also will not apply strictly to the 1907 Act, but again it is submitted the two statutory provisions are *in pari materia.*

None of these powers give any control over the premises themselves, which, if in the wrong location, can be most unsightly. Scrap metal yards can be controlled only by the town and country planning legislation; in many cases, however, a "permitted use" has been acquired by the lapse of time and inanition on the part of the planning authority. Registration cannot be refused an applicant under the 1907 Act, nor can an existing registration be cancelled, and therefore the only means of moving an established business in the "wrong" location is for the local planning authority to take action under section 26 of the Town and Country Planning Act, 1947, under which the "authorised use" is required to be discontinued, in the interests of the proper planning of the area (including the interests of amenity), regard being had to the development plan for the area and any other material considerations. If action is taken under this section, however, compensation will probably become payable under section 27 of the 1947 Act, and this may well be substantial, especially in these days when old metals fetch such high prices.

Old metal dealers serve a necessary and useful purpose in our modern economy, and we are very far from suggesting that they are all, or that many of their number are, dishonest, but pilfering of lead from the roofs of country churches and other buildings, the stealing and disposal of scrap from service dumps, and the many other similar offences which we have seen in the criminal courts in recent years, would not be so prevalent if there were no receivers. We have also mentioned the planning aspect, because this is another way in which the old metal trade, if not properly carried on, may be or become an injury to the community. It is suggested that the existing powers of control need strengthening, and that the police powers need simplification.

Practice and Procedure

Drafting and Inspection of Indictments

On November 12, 1956, Lord Goddard C.J., sitting in the Court of Criminal Appeal with Hallett and McNair JJ., gave the following practice direction [1] with regard to the drafting and inspection of indictments:—

"(1) The prosecution are entitled to require that the terms of an indictment should be settled by counsel. Clerks of Assize and of the Peace can require it to be settled by counsel when they think fit. The necessity and cost of employing counsel will be a matter for the taxing officer.

"(2) Where an indictment or draft indictment settled but not signed contains counts which differ materially from or are additional to the charges on which the accused was committed for trial, the Clerk of Assize or Clerk of the Peace shall, except where the indictment has been settled by counsel for the prosecution, notify the prosecution and the accused of the fact and, where the indictment has been settled by counsel for the prosecution, notify the accused of the fact as soon as may be.

"(3) On or after Commission Day at Assizes or the day before the Sessions open at the Central Criminal Court or at Quarter Sessions or earlier at the discretion of the Clerk of Assize or Clerk of the Peace, facilities shall be given to the prosecution and to the accused to inspect the indictment or the draft indictment if the indictment has not then been signed. If on those days the indictment is not drafted, such facilities shall be given as soon as possible." [Henry Palmer, *Barrister-at-Law*.]

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[1] [1956] 1 W.L.R. 1499; [1956] 3 All E.R. 704.

See p. 70, below.

Ordering Separate Trials

Under section 4 of the Indictments Act, 1915, " . . . charges for more than one felony or for more than one misdemeanour, and charges for both felonies and misdemeanours, may be joined in the same indictment . . . ," and under Schedule I, rule 3, of that Act, " Charges for any offences whether felonies or misdemeanours may be joined in the same indictment if those charges are founded on the same facts or form or are part of a series of offences of the same or a similar character." It is now well established that charges of different types should not be joined in one indictment where the evidence upon some would be unduly prejudicial to the defendant upon other charges. Section 5 (3) of the Indictments Act, 1915, gives the presiding judge power, at his discretion, to order separate trials of one or more counts of an indictment. It lays down, " Where, before trial, or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment." It is a matter entirely within the discretion of the trial judge. Such discretion might well be exercised, for instance, in a case where evidence, which is admissible on one count of an indictment, is not only highly prejudicial but clearly inadmissible on other counts of the indictment.

Frequently, the question of ordering separate trials is a complex and difficult one. It may be, for example, that there is a risk that the jury may find difficulty in distinguishing the evidence referable to different counts of an indictment, and " when considering one count may be unable to disregard the evidence relating to another count " ; or that it would be difficult to separate the evidence upon different counts clearly for the purpose of summing up. Grounds such as these may well be sufficient for the judge to order separate trials of one or more counts of an indictment, but it is a matter entirely within his discretion depending on the circumstances peculiar to the case before him.

In a recent case before the County of London Sessions an application was made for the separate trials of two counts of an indictment. On the first count the defendant was charged with receiving some 720 national insurance stamps knowing them to have been stolen, and on the second count he was charged with knowingly and with intent to defraud Her Majesty of the duty payable thereon carrying five Swiss watches upon which customs duty had not been paid. Both counts arose from substantially the same facts. The defendant had, it was alleged, been stopped whilst driving his lorry. The lorry was searched and in the cab were found both the stolen national insurance stamps and the un-customed watches. It was quite clear therefore that the two charges were properly joined in the one indictment under rule 3. Counsel for the defence, however, applied for the two counts to be tried separately on the grounds, first, that if the two counts were tried together it would be extremely embarrassing to the defence and, secondly, that it would be very difficult for the jury to define and distinguish the evidence relating to each particular count and to realise the full implications of the onus of proof in connection with the two counts. He submitted that, so far as the count dealing with receiving stolen goods was concerned, the onus of proving the defendant's guilt rested upon the prosecution throughout the case. It was up to them at all times to prove his guilt and never for him to prove his innocence. In the count relating to the customs offence, on the other hand, the question of the burden of proof was completely different. It was not up to the prosecution in such a case to prove the negative averment—*i.e.*, prove that customs duty had *not* been paid—but up to the defendant to prove the affirmative—*i.e.*, that customs duty *had* been paid. Counsel for the defence submitted that the fact that the burden of proof rested upon the prosecution in one count of the indictment and upon the defendant in the other count was, in itself, a sufficient reason for ordering separate trials of the two counts. The jury might find it extremely difficult to assess whether or not the respective burdens had been discharged. In addition, the defence in this case would be extremely embarrassed if the two counts were allowed to be tried together as, in the receiving count with the onus of proof resting at all times upon the prosecution, he (counsel) was satisfied that the proper way of conducting his case on this count was *not* to call the defendant to give sworn evidence in the witness-box. However, the defendant would be obliged to give sworn evidence in the case of the customs count, to discharge the onus resting upon him in relation to that count. If he gave evidence upon the customs charge he would then be cross-examined by the prosecution about the receiving count. It therefore seemed embarrassing and unfair that the defendant should be put into that position. If separate trials upon the two counts were ordered the defendant would go into the witness-box and give sworn evidence on the trial of the customs count, but would not on the trial of the receiving count.

The learned deputy chairman said that he agreed that the fact that the onus of proof was on the prosecution in one count and on the defendant in the other might well prove confusing to the jury, and he could also see the difficulty in which the defence found themselves placed. He thought that this was a case in which he could properly exercise his discretion. He therefore ordered the two counts of the indictment to be tried separately. [H. J. Cook, *Barrister-at-Law*.]

Hostile Witness

See p. 51, below.

Criminal Proceedings for Assault as a Bar to Subsequent Civil Proceedings

Section 44 of the Offences against the Person Act, 1861, provides that where justices hear a complaint of assault and dismiss the case they must give a certificate stating the fact of such dismissal to the party against whom the complaint was preferred. Section 45 provides that if any person obtains such a certificate or, having been convicted, pays the whole amount adjudged to be paid or suffers imprisonment he shall be released from all further or other proceedings, civil or criminal, for the same cause.

In *Gibbons* v. *Harris*[2] heard before Judge Clothier Q.C. at Lambeth County Court on October 10, 1956, a preliminary point of law arose as to whether previous criminal proceedings for common assault brought in a magistrates' court by one of the plaintiffs in the present action were a bar to a civil action for damages arising from the same assault where the defendant had been convicted and bound over on his own recognisance of £10 to keep the peace and to be of good behaviour for twelve months.

It was held that as no certificate had been issued under section 44 and as a recognisance could not be described as being either an "amount adjudged to be paid" or an imprisonment under section 45, the result of the previous criminal proceedings did not fall within either section. They did not, therefore, operate as a bar to the present proceedings despite the obvious moral objection that had the magistrate found the offence to be more serious and awarded a heavier penalty the defendant would have been released by virtue of section 45. [Michael Beckman, *Barrister-at-Law*.]

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[2] For the plaintiff: *M. Beckman* (instructed by Buckeridge & Braune).

Summary Justice

Dangerous drugs

Opium. Indian in possession of four grains of opium; prosecution asked by Chief Constable to draw to court's attention the serious view he took of the matter; fined £100, ordered to pay £4 16s. costs; Singh: Coventry Magistrates' Court (*Birmingham Mail*, November 17, 1956).

Indian hemp. Jamaican in possession of Indian hemp; fined £25, ordered to pay £3 3s. costs; Welch: Smethwick Magistrates' Court (*Birmingham Mail*, November 15, 1956).

Highways

Unlawfully, by misbehaviour, interrupting the free passage on a highway contrary to the Highway Act, 1835. Operating pedestrian crossing lights when he did not want to cross the road; fined £2 10s.; Gurr: Hastings Magistrates' Court (*The Times*, November 23, 1956).

Rivers

Fishing. Shooting trout with a rifle. Taking trout otherwise than by means of a licensed instrument, discharging a bullet from a rifle for the purpose of killing trout and having rifle in his possession without a firearms certificate; fined £3 10s.; Fox: Otley Magistrates' Court (*The Times*, November 24, 1956).

Road traffic

Aiding and abetting a person to carry a passenger on a motorcycle otherwise than on a proper seat; girl riding side saddle said her skirt was too tight and she could not sit properly; discharged absolutely: Oxford Magistrates' Court (*The Times*, November 16, 1956).

Riding a bicycle while under the influence of drink contrary to section 15 (1) of the Road Traffic Act, 1930, as applied by the Road Traffic Act, 1956, s. 11; boy, aged fifteen; fined 10s., ordered to pay £3 3s. costs: Highgate Juvenile Court (*The Times*, November 21, 1956).

Riding a bicycle while under the influence of drink contrary to section 15 (1) of the Road Traffic Act, 1930, as applied by the Road Traffic Act, 1956, s. 11; youth, aged nineteen; fined £10, ordered to pay £2 2s. advocate's fee; Oestreich: Cardiff Magistrates' Court (*Birmingham Mail*, November 2, 1956).

Speeding. Speeding in a lorry on Watford by-pass; driver said he was trying to get home because his feet were wet; fined £3; Holiman: Watford Magistrates' Court (*Evening Standard*, November 15, 1956).

Vagrancy

Sleeping out in a motor-vehicle in a Liverpool street; probation officer said accused hoped court would oblige him by sending him to prison for Christmas; sentenced to 56 days' imprisonment; Smellman: Liverpool Magistrates' Court (*Liverpool Echo*, November 29, 1956).

Wireless telegraphy

Skipper of trawler using the radio telephone in the trawler for transmitting messages to his home; caused congestion on the inter-ship frequencies; fined £2 on each of three summonses; Burwood: Lowestoft Magistrates' Court (*The Times*, November 21, 1956).

Case and Comment [*]

Attempt—*Gross indecency*. See R. v. Wood, p. 54, below.

Corrective Training—*Statutory notice—notice of only one previous conviction—sentence of corrective training for it*

R. v. Beresford [1] (Lincolnshire Assizes: Stable J.: October 31, 1956).

On plea of Guilty by the prisoner, counsel for the prosecution said that he proposed to prove a statutory notice under section 23 of the Criminal Justice Act, 1948. He then called a police officer, who proved due service of such a notice on the prisoner and on the court. The notice set out only one previous conviction and a sentence of corrective training in respect of it.

Stable J. said that he did not intend expressly to decide the point, as he was not going to act on the notice, but that, in his view, the notice was invalid by reason of the fact that it referred to one previous conviction only; that such a notice ought to set out all the previous convictions on which it was intended to rely as qualifying the prisoner for corrective training or preventive detention; that the effect of section 23 (2) of the Act, which provides "For the purposes of this section, evidence that a person has previously been sentenced to corrective training or preventive detention shall be evidence of the convictions and sentences which rendered him liable to that sentence" was merely to render sentence of corrective training or preventive detention evidence of the previous convictions and sentences on which it was based should the prisoner be minded to dispute any of these.

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[*] Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab), Barrister-at-Law.

[1] For the prosecution: *J. A. Grieves* (instructed by Burton & Co., Lincoln). For the defence: *Robert D. Lymbery* (instructed by Williams & Glanfield, Lincoln).

[T. R. Fitzwalter Butler, *Barrister-at-Law*.]

COMMENTARY. See also *R.* v. *Evans,* p. 60, below.

Costs—*Conviction quashed on appeal*

R. *v.* GALE [2] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: November 19, 1956).

G. was convicted at quarter sessions of obtaining poultry by false pretences. He appealed successfully to the Court of Criminal Appeal on the ground that there was no evidence to support the verdict. On application to the court for costs:—

Held, that the conviction was quashed on the ground that G. was not guilty, not on the ground of a technicality. Therefore costs would be awarded both in this court and in the court of trial. [H. P.]

COMMENTARY. Under the Costs in Criminal Cases Act, 1952, s. 3 (2), the Court of Criminal Appeal, when it allows an appeal, may order the payment of the appellant's costs out of local funds. The section does not impose any limit on the discretion of the court, but "it was never intended, and it would be quite wrong, that costs should be awarded as of course to every defendant who is acquitted. Its use should be reserved for exceptional cases, and every case should be considered by the court on its own merits": *Practice Note* (1952) 36 Cr.App.R. 13.

Courts-Martial—*Appeal against conviction of murder—powers of court*

R. *v.* RENN [3] (Courts-Martial Appeal Court: Lord Goddard C.J., Hallett and Pearson JJ.: November 19, 1956) (*The Times,* November 20, 1956).

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[2] For the appellant: *A. P. Marshall, Q.C., Michael Sherrard* (instructed by J. Hart-Leverton & Co.). For the Crown: *A. Harmsworth* (instructed by Dell & Loader, Shoreham).

[3] The applicant did not appear and was not represented. The Crown was not represented.

R. was convicted of murder by court-martial in Germany, and was sentenced to death. Subsequently the sentence was reduced by the confirming officer to ten years' imprisonment. R. was a young soldier who had been exposed to a systematic course of bullying by another soldier. On the evening of the incident in question, R. returned to his barrack room where the other soldier continually made him get out of bed while he reviled him or held him up to ridicule. Finally, R. took a sheath knife and stabbed the other soldier whom he thought was going to twist his arm. R. applied to the Courts-Martial Appeal Court for leave to appeal against conviction.

Held, that there was no ground for upsetting the conviction either on the ground that there was a misdirection by the judge advocate or that there was no evidence to support the conviction of murder. The defence at the hearing was a suggestion of self-defence, but the real defence was a reduction to manslaughter on the ground of provocation. This court was unanimously of the opinion that, had the case been tried by a judge and jury, the chances were overwhelming that the jury would have returned a verdict of manslaughter. It was not possible to say that the circumstances were sufficient to justify self-defence, but this court doubted whether R. intended to do more than show the other man that he resented the bullying. However, there was, strictly in law, evidence sufficient to support a conviction of murder and the application would, therefore, have to be refused. The court had no power to alter the sentence. The observation made by the court would be forwarded at once to the appropriate authority. [H. P.]

COMMENTARY. Under the Courts-Martial (Appeals) Act, 1951, the court has no power to alter sentences except in certain special cases provided for by section 6. In any event the only punishment permitted by the law on a conviction of murder is death: see Army Act, s. 41 (2).

The case is interesting for the Lord Chief Justice's recognition that the severity of the law may be mitigated in a hard case by the joint action of judge and jury. He quoted, apparently with approval, a summing-up of Lord Mansfield's in which he told the jury that they "exist for purpose of mitigating the rigours of the common law": and Lord Goddard said that if a judge at assizes had been dealing with this case "he would have summed up in a way which showed that he would have liked a verdict of manslaughter to be returned."

The Army Council has decided that the sentence of ten years' imprisonment should be reduced to one of two years' imprisonment (H.C. Debates, Vol. 561, col. 210; November 27, 1956).

Courts-Martial—*Certificate of arrest—statement that at the time of arrest accused was in civilian clothes*

R. *v.* MAHONEY[4] (Courts-Martial Appeal Court: Lord Goddard C.J., Hallett and Pearson JJ.: November 19, 1956) ([1956] 3 All E.R. 799).

M. was convicted by court-martial of desertion. A certificate of arrest in the following terms: "I certify that the accused of the Middlesex Regiment was arrested at Midhurst, Sussex, at 19.45 hours on April 13, 1956, and at the time of his arrest was wearing civilian clothes," was put in evidence at the trial. On appeal against conviction to the Courts-Martial Appeal Court:—

Held, dismissing the appeal, that there was ample evidence to support the conviction and to support the finding of an intention to desert. By section 163 of the Army Act a certificate purporting to be signed by a provost marshal, assistant provost marshal or other officer that a soldier has been arrested and taken into custody and stating the fact, date and place of arrest was evidence, in proceedings against a soldier on a charge of desertion, of the matters so stated. But the words "at the time of his arrest was wearing civilian clothes" in the certificate ought not to have been inserted, and the passage in the Manual of Military Law that a statement to that effect was admissible as part of the fact of the surrender or apprehension was wrong. However, as the point was never taken at the hearing nor was it taken in the notice of appeal, this court considered they were obviously justified in applying the proviso to section 5 (1) of the Courts-Martial (Appeals) Act, 1951. Accordingly, the appeal would be dismissed. [H. P.]

COMMENTARY. In the absence of the statutory provision the certificate would not be evidence of the facts therein stated. The statute makes the certificate admissible evidence of the facts referred to in the statute, but it is not evidence of any other facts which may be mentioned, as to which it remains mere hearsay.

The proviso to section 5 (1) of the Courts-Martial (Appeals) Act is identical with the proviso to section 4 (1) of the Criminal Appeal Act, 1907: *i.e.,* "the court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

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[4] For the appellant: *W. R. Rees-Davies* (instructed by Wilder & Sorrell, Hornsey). For the Crown: *E. Garth Moore* (instructed by the Director of Army Legal Services).

Courts-Martial—*Joint trial of separate offences—indecency*

R. *v.* FEGREDO [5] (Courts-Martial Appeal Court: Lord Goddard C.J., Hallett and Ashworth JJ.: November 5, 1956).

F. was convicted by court-martial of indecent exposure. He was acquitted of another charge of indecent exposure which was alleged to have taken place a month earlier. The court-martial tried both cases together, after refusing an application for separate trials. On appeal against conviction, it was contended (i) that the court-martial were wrong in hearing both charges together, and (ii) that the witnesses who had given evidence were improperly allowed to mix with the witnesses who had not.

Held, dismissing the appeal, that the rules of procedure applying to courts-martial directed that cases should be taken separately unless the application for separate trials was unreasonable. A note appended for guidance pointed out that in cases of indecency it was open to the prosecution to lead evidence of other acts of indecency so that somewhat different considerations applied to the question of whether or not those cases should be tried separately. There was no possible ground for complaint that the court-martial exercised its discretion and tried the cases together. As to the second ground of appeal, it was, no doubt, desirable that witnesses who had given their evidence should remain in court so that they did not tell the other witnesses what evidence they had given, but the fact that the witnesses who had given evidence were allowed to mix with those who had not was no ground for quashing the conviction. There was, therefore, no ground for interfering with this conviction and the appeal would be dismissed. [H. P.]

COMMENTARY. The rule in the civil courts is that the court may order a separate trial of one or more offences charged in an indictment if the court is of the opinion that the accused may be prejudiced or embarrassed in his defence by a joint trial, or if separate trials are desirable for any other reason: Indictments Act, 1915, s. 5 (3). The court-martial rule appears to be more favourable to the accused. Where the evidence to be given by the prosecution on count A would also be admissible on the trial of count B, counts A and B are properly tried together: *R.* v. *Hall* [1952] 1 K.B. 302. See Archbold, 33rd ed., 59.

That witnesses who have given evidence should not be allowed to mix with those who have not would seem to be the corollary of the rule that a witness who has not yet given his evidence may, at the request of either party be ordered out of court during the examination of the preceding witnesses. See Archbold, 33rd ed., 515.

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[5] For the appellant: *M. G. Polson* (instructed by W. Bradly Trimmer & Son, Alton). For the Crown: *E. Garth Moore* (instructed by the Director of Army Legal Services).

Courts-Martial—*Witnesses.* See R. *v.* FEGREDO, p. 50, above.

Evidence—*Evidence in possession of prosecution contradicting that of witness—duty of prosecution to cross-examine*

R. *v.* FRASER AND WARREN [6] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Ashworth JJ.: November 5, 1956) (*The Times*, November 6, 1956).

F. and W. were convicted at the Central Criminal Court of wounding one C. with intent to do him grievous bodily harm, and each was sentenced to seven years' imprisonment. On application to the Court of Criminal Appeal for leave to appeal:—

Held, refusing the applications, that C., two days after the attack, had enumerated his attackers to the police. He had named, among others, F. and W., saying that one had been armed with a knife and the other with an iron bar. In the witness box, C. denied all knowledge of these men as his attackers. If prosecuting counsel had the original statement in his possession, it was his duty to show it to the judge and to ask leave to cross-examine C. as a hostile witness. As it was, the matter came to light during the evidence of a police officer who was asked if C.'s wife had named certain other persons as among C.'s attackers. The officer replied that it was not C.'s wife but C. The judge then sent for the statement and put questions to C. that ought to have been put by prosecuting counsel. The judge had acted rightly. If the prosecution had in their possession evidence in direct contradiction to that given by a witness which entitled them to cross-examine, then they should do so, and it was not right that that should be left for the judge. [H. P.]

COMMENTARY. Under section 3 of the Criminal Procedure Act, 1865, a party producing a witness is not allowed to impeach his credit by general evidence of bad character " but he may, in case the witness shall in the opinion of the judge prove adverse, contradict him by other evidence, or by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony." A witness is not adverse for the purposes of the Act merely because his testimony is unfavourable to the party calling him, but only if he is " hostile ": *Greenough* v. *Eccles* (1859) 28 L.J.C.P. 160. A hostile witness is one who "shows *animus* against the party calling him, and a consequent unwillingness to tell the truth" (Nokes, *Introduction to Evidence*, 2nd ed., 133). Whether a witness should be treated as hostile is a matter wholly within the discretion of the judge who may be guided by the witness's behaviour and language in the witness-box: *Rice* v. *Howard* (1886) 16 Q.B.D. 681. The proof of the previous statement is evidence only to discredit the story which the witness tells in the witness box and is not evidence of the facts stated therein: *R.* v. *Dibble* (1908) 1 Cr.App.R. 155; *R.* v. *White* (1922) 17 Cr.App.R. 60. Thus, in the present case C's statement to the police was presumably not offered as evidence of the guilt of F and W but merely to show that the story told by C in the box was not to be believed.

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[6] For the applicants: *Bernard Gillis, Q.C., Patrick Marrinan* (instructed by Probyn, Dighton & Parkhouse). The Crown was not represented.

Evidence—*Further evidence before Court of Criminal Appeal—evidence of alibi*

R. *v.* HARRIGAN[7] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Ashworth JJ.: October 29, 1956) (*The Times*, October 30, 1956).

H. was convicted at the Central Criminal Court of robbery with violence and was sentenced to three years' imprisonment. The evidence at the trial was that a man had snatched a bag containing some £2,000 in wages from one C. and his companion G. in a public street. Neither C. nor G. was able to identify the man, but a bystander P. gave evidence that H. was the robber. H. called two witnesses to say that H. was with them at the time of the robbery. H. appealed to the Court of Criminal Appeal against his conviction where he applied for and was granted leave to call further evidence. On appeal one Greenland gave evidence that he was with H. at a time which made it impossible for H. to have committed the offence.

Held, allowing the appeal, that the court having read the evidence taken at the hearing had not felt altogether easy about the verdict of guilty. The court did not usually allow further evidence to be given if it could have been called in the court below. This court had been moved to allow Greenland to be called as a witness because there was no suggestion that he and H. were friends or had even known each other before except in some business sense. Greenland appeared to be a person of great respectability and some position and if he could give evidence which showed the probability of a mistake, the court ought to hear him. The court were quite satisfied that had his evidence been before the jury it was very unlikely that they would have convicted. The trial judge had made a report that had Greenland's evidence been before the court, he would have felt it his duty to direct the jury to acquit. There were wholly exceptional circumstances in this case and the court hoped that it would not in the future be cited as a precedent for that reason. Accepting Greenland's evidence, the only course was to quash the conviction. [H. P.]

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[7] For the appellant: *James Burge* (instructed by Kingsley, Napley & Co.). For the Crown: *Edward Cussen, N. Vincent* (instructed by the Director of Public Prosecutions).

COMMENTARY. See the commentary to *R.* v. *Musial* [1956] Crim. L.R. 844. It is not easy to see what was "wholly exceptional" about this case. Great emphasis is laid upon the reliability of the new witness who was called in the Court of Criminal Appeal. But, as the court can hardly say whether a witness is reliable or not until it has heard him give evidence, that is not a factor which can properly be taken into account in deciding whether to hear him. Apart from that it seems to be simply a case of an additional witness as to an alibi who apparently could have been called in the court below but was not. It is submitted with respect that it was, nevertheless, a case in which the court was very wise to depart from its rule of practice by which it does not hear witnesses who could have been called in the court below; and it is not easy to see why it should not be regarded as a precedent for similar cases in the future.

Evidence—*Onus of proof*. See WALTER WILSON & SON LTD. *v.* SUMMERFIELD, p. 55, below.

Factories—*Dangerous machinery—duty to fence—milling operation*

MORRIS MOTORS LTD. *v.* HOPGOOD [8] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Ashworth JJ.: October 11, 1956) ([1956] 3 W.L.R. 767; [1956] 3 All E.R. 467).

P. was employed by the defendants in their factory to operate a machine to which the Horizontal Milling Machines Regulations, 1928 (S.R. & O. No. 548), applied. The machine was operated by electrical energy, the components to be milled being put by the operator in a jig, which advanced to bring the components into contact with the cutters. Between the cutters and the jig when in a fully retracted position was a strong guard as required by reg. 3 (1). When the jig was in the retracted position there was a gap in the guard through which access to the cutter was possible. On the advance of the jig, it passed into the gap in the guard and completely closed it. The cutters were set in motion only when the jig was within one-eighth of an inch from the cutters when the combination of the jig and the guard formed a continuous fence. While P. was operating the machine with his hand in between the front of the jig and the guard, the jig moved forward bringing P.'s hand into contact with the cutters and he was injured. On an information by the prosecutor, a factory inspector, under reg. 3 (1) of the regulations, the justices convicted the defendants, who appealed to quarter sessions. The recorder held that the milling operation began when the components were put into the jig and that the regulations did not merely require the machine to be fenced when the cutters were in motion. Therefore the defendants were in breach of the regulation. On appeal:—

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[8] For the defendants: *Marven Everett, Q.C., A. E. Jones, Escott Cox* (instructed by Herbert & Gowers & Co. for Philip Baker & Co., Birmingham). For the prosecutor: *W. A. Sime* (instructed by Solicitor, Ministry of Labour).

Held, allowing the appeal, that reg. 3 must be read in conjunction with reg. 6 and it was only necessary that the guard should be in position when the cutters were in motion and not during the whole of the milling operation; accordingly, the defendants were not in breach of reg. 3 (1). [J. D. P.]

Gross Indecency—*Alleged attempt to procure—passing of note in public lavatory—whether act of preparation for offence only*

R. *v*. Wood [9] (Lincolnshire (Lindsey) Quarter Sessions: His Honour W. K. Carter, Chairman: October 19, 1956).

The prisoner was charged with attempting to procure another male person (a police officer) to commit an act of gross indecency with him. The police officer, together with another police officer, was in a compartment in a public lavatory for the purpose of keeping watch. The prisoner entered the next compartment and, after he had been there some time, passed through the partition a note written on toilet paper containing the words: "How old are you? Are you single?" On obtaining no answer, he passed a similar note some ten minutes later with the words "Why don't you answer?", the note on this occasion being wrapped round a Biro pen. The police officers then left their compartment, knocked on the door of the compartment occupied by the prisoner, and subsequently arrested him. Counsel for the prosecution submitted that the conduct of the prisoner was capable of amounting to an attempt, inasmuch as the terms of the note were such that it would convey to the mind of the recipient that the prisoner desired to indulge in indecent conduct of a homosexual nature with him, and that the case was covered by *R.* v. *Cope* (1921) 16 Cr.App.R. 77, which he distinguished from *R.* v. *Woods* (1930) 22 Cr.App.R. 41, where the letter, which purported to be written by a woman, would not have conveyed the same desire to the mind of the recipient. Counsel for the defence submitted that the conduct of the prisoner did not amount to more than preparation for the commission of the offence.

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[9] For the prosecution: *T. R. Fitzwalter Butler* (instructed by John Barkers, Grimsby). For the defence: *Peter Lewis* (instructed by Alex. Browne, Grimsby).

The chairman ruled that the conduct of the prisoner was capable of amounting to an attempt and that the case must go to the jury, and when he came to sum up, so directed the jury. The jury convicted the prisoner, who was sentenced to three months' imprisonment.

[T. R. Fitzwalter Butler, *Barrister-at-Law.*]

COMMENTARY. Whether acts done with intent to commit a specific crime are sufficiently proximate to the specific crime to constitute the *actus reus* of an attempt to commit that crime is a question of law for the judge. Whether the accused did the acts alleged is, of course, a question for the jury, as is the question of the intent with which they were done.

The following test of what is a sufficient *actus reus* was formulated by Mr. J. W. C. Turner (*The Modern Approach to Criminal Law,* 279) and has been adopted by Archbold (see 33rd ed., 1489): "The *actus reus* of an attempt to commit a specific crime is constituted when the accused person does an act which is a step towards the commission of that specific crime, and the doing of such act cannot reasonably be regarded as having any other purpose than the commission of that specific crime." The ruling of the chairman in the instant case would seem to be in accordance with this test, as well as with the authorities cited.

Harbours, Docks and Piers—*Dock regulations—safe means of access*

WALTER WILSON & SON, LTD. *v.* SUMMERFIELD[10] (Q.B. Divisional Court: Lord Goddard C.J., Hallett and Donovan JJ.: October 19, 1956) ([1956] 1 W.L.R. 1429; [1956] 3 All E.R. 550).

Stevedores were engaged in unloading a ship which was lying alongside a dumb barge between the ship and the quay. At first the ship's gangway was used as a means of access to the ship for persons employed in the unloading, but the gangway broke and was replaced by a ladder of sound material and adequate length.

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[10] For the defendants: *Victor Durand* (instructed by Chalton Hubbard & Co.). For the prosecutor: *Walter Gumbel* (instructed by Solicitor, Ministry of Labour and National Service).

The stevedores did not possess a gangway and took no steps to procure one. On an information against the stevedores alleging that they had failed to provide a safe means of access as required by the Dock Regulations, 1934 (S.R. & O., No. 279), reg. 9, they were convicted. On appeal:—

Held, that a ladder might only be used as a means of access if it was not reasonably practicable to provide a gangway; that the onus of proving that it was not reasonably practicable was on the stevedores, and they had failed to discharge it. Accordingly, they were rightly convicted. [J. D. P.]

COMMENTARY. The primary duty to provide an accommodation ladder or gangway is on the ship; but if the ship does not do so the duty is shifted to the employer of the stevedores.

That the onus was on the defendants to prove that it was not reasonably practicable for the ship's accommodation ladder or gangway to be used seems to have been decided by Lord Goddard on the ground that this was a matter which lay peculiarly within their knowledge: "I cannot see that anyone can prove that it was not reasonably practicable . . . except the defendants." In so holding the Lord Chief Justice was following *dicta* in two earlier civil cases decided by the Court of Appeal: *Callaghan* v. *Fred Kidd Ltd.* [1944] K.B. 560, 565; *McCarthy* v. *Coldair, Ltd.* [1951] 2 T.L.R. 1226, 1228. In the present case Hallett J., while agreeing in the result, preferred to base his decision simply on the construction of the regulation as Lord Tucker did in *Marshall* v. *Gotham, Ltd.* [1954] A.C. 360, 374: this was the case of an exception, and the person seeking to escape liability must prove that he came within it.

It is an established rule of evidence that "where the truth of a party's allegation lies peculiarly within the knowledge of his opponent, the burden of disproving it lies upon the latter" (Halsbury, 3rd ed., Vol. 15, 270). See *R.* v. *Turner* (1816) 5 M. & S. 206; *R.* v. *Oliver* [1944] K.B. 68. Thus, when an Act of Parliament provides that a person shall not do a certain thing unless he has a licence, the onus is always on the defendant to prove that he has a licence, because it is a fact peculiarly within his knowledge: *John* v. *Humphreys* [1955] Crim. L.R. 320.

Hallett J. thought that this principle "is capable of having very widespread results if it be applied generally." It is respectfully submitted that there is much to be said for this view and that the principle should perhaps be confined to cases of licences and similar permissions. Where the accused was on the night of the murder may be a matter peculiarly within his knowledge, but it would hardly be suggested that this should throw a burden of proof on to him.

Housebreaking—*Breaking into premises containing number of offices and a shop—evidence*

R. *v.* WRIGLEY [11] (Liverpool Crown Court: N. J. Laski, Esq., Q.C., Recorder: October 12, 1956).

The prisoner pleaded Not Guilty to three counts, two alleging officebreaking with intent, and one alleging attempted shopbreaking with intent, in the following terms, namely, that he (i) broke and entered the office of A, with intent to commit a felony, namely to steal therein; (ii) attempted to break and enter the shop of C. & L. with intent to commit a felony, namely, to steal therein; (iii) broke and entered the office of A. with intent to commit a felony therein namely to break and enter the shop of C. & L. with intent to commit a felony, namely, to steal therein. The facts were that the premises into which the prisoner broke were divided internally into several offices, all connected by doors, corridors and stairways. Part of the premises on the ground floor was used as a shop of which C. & L. were tenants. The office into which the prisoner broke was separated from the shop by an office occupied by X. The premises were owned by A. It was not disputed that the prisoner broke the roof of the premises and entered an office on the top floor; nor that on being asked by the police why he was on the roof he replied: "I was after the safe in C. & L.'s." There was evidence that he had interfered with the interior of the office into which he broke by opening doors and windows, but not whether he knew that that office was not part of C. & L.'s shop. He left the office at the demand of the police. Counsel for the defence submitted that there was no case to answer. Counsel for the prosecution referred to *R.* v. *Ring* (1892) 17 Cox 491, and submitted that the relevant time at which intent should be considered was the time of breaking and entering.

Held, there was no evidence on which any of the counts should be left to the jury.

[Peter G. Smith, *Barrister-at-Law.*]

COMMENTARY. It is well established that, for the purposes of burglary, sets of chambers in a college or an inn of court must be considered as distinct dwelling-houses even though they are under the same roof. Similarly, it would seem that in the present case the various office and shop premises in the building, being in the occupation of different persons, must be considered as if they were separate buildings. It is at least clear (from the fact that it was held that there was no evidence on the first count) that the court must have considered that A's premises and C. & L.'s premises were distinct; and it is presumed that X's office was similarly a separate building.

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[11] For the prosecution: *G. L. Close* (instructed by the Town Clerk, Liverpool). For the defence: *R. S. Trotter* (instructed by the accused).

On the first count it would appear that there was ample evidence of an *actus reus* but none of *mens rea*; *i.e.*, there was no evidence that W. intended to steal in the office of A, since he may well have intended to use A's office as a mere corridor to his real destination, the shop of C. & L. If only it could have been proved that W. thought, when he entered A's office, that he was in C. & L.'s shop, it would seem that he could have been convicted on this count. Thus Dr. Glanville Williams writes: ". . . it does not help a burglar to show that he mixed up the street numbers. The reason is that the mistake (even though a mistake of identity) is irrelevant to guilt, because if the facts had been as supposed the crime would still have been committed" (*The Criminal Law*: *The General Part,* § 37; see to the same effect, Kenny, *Outlines of Criminal Law,* 16th ed., 46). If this view is correct it seems that an intention to steal in the office of A is sufficiently proved by evidence that the accused intended to steal on the premises on which he in fact was, though he believed those premises to be not the office of A but other premises.

On the second count W.'s admission of his intent would seem to be sufficient evidence of *mens rea,* so presumably the court held that there was not a sufficient *actus reus*, perhaps on the ground that the act done was not sufficiently proximate since X's office lay between W. and the premises which he was charged with attempting to break and enter. On the third count there was evidence of an *actus reus,* but no evidence of the *mens rea* stated in the indictment. If W. thought, as he may have done, that he was already in C. & L.'s shop clearly he did not thereafter intend to break and enter C. & L.'s.

If it had been proved that W. knew that he was in A's office and intended to break through X's office to C. & L.'s shop, could he have been convicted, on a suitably drawn indictment, of housebreaking? This would depend on whether breaking and entering C. & L.'s shop from X's office with intent to commit a felony in C. & L.'s would amount to the commission of a felony in X's office. It may be doubted whether this would be so since the breaking and entering of C. & L.'s shop would not be complete without entry and this would occur, not in X's office, but in C. & L.'s shop. But, if it were so, then it would follow that W. broke and entered the office of A with intent to commit a felony therein, namely to break and enter the office of X with intent to commit a felony therein, namely to break and enter the shop of C. & L. with intent to commit a felony therein, namely to steal.

House of Lords—*Appeal to—fiat of Attorney-General—mandamus*

Ex p. BLACKBURN [12] (House of Lords: Lords Simonds, Tucker and Somervell of Harrow: November 15, 1956) (*The Times,* November 16, 1956).

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[12] The applicant appeared in person.

The Appeal Committee *refused* this application for leave to appeal from the dismissal by the Court of Appeal ([1956] Crim.L.R. 627) of an application for an order of mandamus requiring the Attorney-General, who had previously refused the applicant the grant of a certificate to appeal to the House of Lords, to consider further representations. According to the applicant, a principle of law of public importance was involved, namely, the onus of proof which rested on the prosecution in criminal cases. [J. D. P.]

COMMENTARY. The applicant's contention was that, where an application has been made within the seven days specified by the Criminal Justice Act, 1925, the Attorney-General is bound to consider representations made by the accused with respect to that application at any time in the future. Lord Simonds pointed out that, if this were so, the Attorney-General would be bound to consider also any representations made by the Director of Public Prosecutions with respect to an application to appeal from an acquittal which had been refused. Mr. Blackburn admitted that this would follow. As the statutory rules are the same for appeals by both prosecution and prisoner, this would seem to be the correct view. The importance of finality in the criminal law therefore weighed heavily against the applicant's contention.

It would seem, nevertheless, that there should be some machinery for the reconsideration of convictions (but not of acquittals) which subsequent decisions show to have been based on a wrong view of the law. *Cf.* the case of *R.* v. *Denyer* [1926] 2 K.B. 258 where, in the light of *Thorne* v. *Motor Trade Association* [1937] A.C. 797, it seems that the accused was wrongly convicted of an offence under section 29 of the Larceny Act, 1916. Denyer received a pardon many years later, but this hardly seems an adequate remedy.

Magistrates—*Wrongful imprisonment—remand for medical report*

BOAKS *v.* REECE [13] (Court of Appeal: Singleton, Jenkins and Parker L.JJ: November 27, 1956) (*The Times*, November 28, 1956).

B. was convicted before a magistrate on charges of obstructing the highway, and was remanded in custody for seven days for a medical report under section 14 (3) of the Magistrates' Courts Act, 1952. In an action by B. ([1956] Crim.L.R. 563), against the magistrate for wrongful imprisonment, B. contended that, inasmuch as section 26 (1) of the Act of 1952, which gave power to remand for a medical examination, applied only to cases where the accused person could be sentenced to imprisonment, and the offences with which he was charged were not punishable by imprisonment, the magistrate had no power to remand him for a medical report. Pilcher J. gave judgment for the magistrate, the jury having found that he did not act vindictively. On appeal:—

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[13] The plaintiff appeared in person. For the magistrate: *H. J. Phillimore, Q.C.*, *Rodger Winn* (instructed by Treasury Solicitor).

Held, dismissing the appeal, that section 16 of the Summary Jurisdiction Act, 1848, and section 25 (1) of the Criminal Justice Act, 1948, made it clear that magistrates had a general power to adjourn a case for the purpose of making inquiries and, in their discretion, to commit an accused to prison meanwhile. Section 14 (3) of the Act of 1952 in no way destroyed the powers given by the previous Acts, and there still remained a general power to remand for the purpose of making inquiries. [J. D. P.]

COMMENTARY. See the commentary to the first instance decision: [1956] Crim.L.R. 563.

Mandamus—*Appeal to House of Lords.* See *Ex p.* BLACKBURN, p. 58, above.

Murder—*Reduction of charge to manslaughter.* See R. *v.* RENN, p. 47, above.

Preventive Detention—*Statutory notice—notice of intention to prove previous sentence of preventive detention*

R. *v.* EVANS [14] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and McNair JJ.: November 12, 1956) ([1956] 3 W.L.R. 978; [1956] 3 All E.R. 750).

E. was convicted at a magistrates' court of the larceny of a bicycle and sent to quarter sessions for sentence. E. had twenty-one previous convictions, one of which had resulted in the imposition of a term of preventive detention. Notice was served on him by the prosecution that they intended to prove that he had previously been sentenced to a term of preventive detention. Quarter sessions thereupon sentenced him to a further term of eight years' preventive detention. E. appealed to the Court of Criminal Appeal on the ground that the requirements of section 23 of the Criminal Justice Act, 1948, had not been complied with.

Held, varying the sentence, that the notice served by the prosecution was defective in that it did not give notice of three previous convictions, on two of which sentences of Borstal training, imprisonment or corrective training had been imposed. Accordingly, the provisions of section 23 of the Criminal Justice Act, 1948, had not been complied with and E. was not liable to be sentenced to preventive detention. The sentence would, therefore, be varied to one of eight years' imprisonment. [H. P.]

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[14] For the appellant: *G. E. McClelland* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Ithel Davies* (instructed by W. Rosin, Bridgend).

COMMENTARY. Section 23 (2) of the Criminal Justice Act, 1948, provides that " evidence that a person has previously been sentenced to corrective training or preventive detention shall be evidence of the convictions and sentences which rendered him liable to that sentence." The case makes it clear that this subsection relates only to proof of convictions in court when they are not admitted by the accused. The notice required by section 23 (1) must specify the convictions which rendered the accused liable to the previous sentence of preventive detention. If the accused then denies the previous convictions the sentence of preventive detention is evidence against him, the question being determined by the verdict of a jury. See also *R.* v. *Beresford* (above, p. 46).

A circular has been sent to chief constables drawing their attention to this case and to the strict requirements of section 23 of the Criminal Justice Act, 1948. The Home Secretary has considered the remarks of Lord Goddard C.J. in this case as to the desirability of amending the section so as to make a notice of intention by the police to prove a previous conviction sufficient to enable the court to apply the provisions of the section where a previous sentence of preventive detention or corrective training has been imposed. He has noted the point for amending legislation when a suitable opportunity occurs (H.C. Debates, Vol. 560, col. *40*; November 16, 1956).

Sentence—*Notice of intention to prove previous convictions.* See R. *v.* BERESFORD, p. 46, above; R. *v.* EVANS, p. 60, above.

Sentence—*Postponed sentence—conditional discharge preferred*

R. *v.* STEWART[15] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Ashworth JJ.: October 22, 1956).

S. pleaded guilty on July 12, 1955, at the Salford Hundred Quarter Sessions to a charge of housebreaking, and sentence was postponed for twelve months. A few days later, S. committed another offence in respect of which he was brought before the West Riding Quarter Sessions and sentenced to twelve months' imprisonment. S. served that sentence and was re-arrested shortly after leaving prison and was brought up for sentence at the Salford

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[15] The appellant appeared in person. The Crown was not represented.

Hundred Quarter Sessions where he was sentenced to a further twelve months' imprisonment. He appealed against the latter sentence to the Court of Criminal Appeal.

Held, reducing the sentence, that in the opinion of the court, the quarter sessions had not dealt with the case in the right way; it was undesirable that S. should have been re-arrested the moment he came out of prison. It was much better for an offender to be given a conditional discharge, which meant that he would be free if he behaved himself but would be brought up to be dealt with if he committed any further offence, rather than to postpone sentence on him. The court would, in the circumstances, reduce this sentence to one which would entitle S. to be discharged forthwith. [H. P.]

Sentence—*Preventive detention—substitution of term of imprisonment*

R. *v*. Abbott[16] (Court of Criminal Appeal: Hilbery, Ormerod and Ashworth JJ.: October 8, 1956) (*The Times*, October 9, 1956).

A. was convicted with others of being in possession of housebreaking implements by night, and was sentenced to eight years' preventive detention. A., who was thirty-four years of age, had eight previous convictions for larcenies, receiving and being a suspected person loitering with intent. On appeal to the Court of Criminal Appeal against his sentence:—

Held, reducing the sentence, that the time for imposing a sentence of preventive detention on A. had not at present arrived, but this was probably the last occasion on which he would escape a long sentence of preventive detention. In the circumstances of this case, the sentence would be reduced to one of four years' imprisonment. [H. P.]

Commentary. The Court of Criminal Appeal discourages sentences of preventive detention where sentences of imprisonment are appropriate. See *R.* v. *Horn* [1956] Crim.L.R. 343; *R.* v. *Walls* [1956] Crim.L.R. 209.

Trial—*Duty of prosecution where in possession of previous inconsistent statement.* See R. *v*. Fraser and Warren, p. 51, above.

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[16] The appellant appeared in person. The Crown was not represented.

Trial—*Right to transcript and notes of evidence—" party interested "*

R. *v.* GRECH [17] (Court of Criminal Appeal: Lord Goddard C.J., Hallett and Pearson JJ.: November 19, 1956) (*The Times,* November 20, 1956).

G. was convicted of housebreaking and larceny in October, 1954, and sentenced to three years' imprisonment. In the subsequent case where two persons were convicted of conspiracy to pervert the course of justice, G. gave evidence. He applied to the Court of Criminal Appeal for a copy of the transcript and notes of evidence taken in that case, contending that he proposed to petition the Home Secretary and that the petition was to be founded upon the transcript and notes of evidence. Matters favourable to G. had come to light in the later trial, so that G. was a " party interested " to whom a copy of the transcript could be furnished under section 16 of the Criminal Appeal Act, 1907.

Held, dismissing the application, that G. was not affected by any order made at the trial, nor was he the prosecutor. Accordingly, he was not a " party interested." [H. P.]

COMMENTARY. Rule 5 (*e*) of the Criminal Appeal Rules, 1908, provides that a party interested in an appeal under the Act may obtain from the Registrar a copy of the transcript. A " party interested " is defined " for the purposes of this Rule " by Rule 5 (*f*) as " the prosecutor (not being the Director of Public Prosecutions), or the person convicted, or any other person named in, or immediately affected by, any order made by the judge of the court of trial." Section 16 (1) of the Criminal Appeal Act, 1907, also provides that a transcript shall be furnished " to any party interested." The court evidently applied the definition contained in rule 5 (*f*) to the construction of section 16 (1).

See also [1956] Crim.L.R. 219.

Acts and Orders *

Agriculture

Pigs: see below.

Potatoes: see p. 66, below.

Animals

SWINE FEVER (INFECTED AREAS RESTRICTIONS) ORDER, 1956 (S.I. No. 1750): operative November 19, 1956. In any area specified in any subsequent special Order no sale or gathering of swine shall be held in any market, fairground or saleyard unless the holding thereof is authorised by the local authority. Only fat swine for immediate slaughter may be included in such sales. The movement of swine into, out of and within the areas is also regulated.

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[17] For the applicant: *John Platts-Mills* (instructed by F. Henry Pierre).

* Prepared by F. Maurice Drake, Esq., Barrister-at-Law.

For the powers of the police with regard to this Order see section 71 of the Diseases of Animals Act, 1950, and for penalties for contraventions, see sections 78–80 of that Act.

Children and Young Persons

School attendance: see p. 67, below.

Customs and Excise

EXPORT OF GOODS (CONTROL) (CONSOLIDATION) ORDER, 1956 (S.I. No. 1702): operative November 6, 1956. This Order supersedes the Export of Goods (Control) (Consolidation) Order, 1955 (S.I. 1955, No. 518; [1955] Crim.L.R. 391) and the subsequent amendment Orders. It recapitulates the regulations contained in those Orders and makes no change in the law.

For penalties for contraventions, see section 3 of the Import, Export and Customs Powers (Defence) Act, 1939.

Defence Regulations

MOTOR FUEL ORDER, 1956 (S.I. No. 1742): operative November 8, 1956, but was revoked and superseded by the MOTOR FUEL (No. 2) ORDER, 1956 (S.I. No. 1840): fully operative December 17, 1956. Motor fuel is rationed. Heavy oil for use in motor-vehicles and motor spirit, other than aviation spirit, may be supplied or acquired only against the surrender of coupons or under a licence. This applies to wholesale as well as retail supplies, but the surrender of coupons by retailers for wholesale supplies is subject to an allowance of 1 per cent. of the amount supplied.

The surrender of coupons is not required in the case of (i) motor fuel supplied for refining, treating or blending; (ii) benzole (other than motor benzole mixtures), special boiling point spirits, white spirit, rubber solvent or kerosene; (iii) diesel oil for use in certain specified vehicles mainly used for agricultural purposes; (iv) the importation of motor fuel.

Certain particulars are required to be entered on coupons before they are surrendered, and, while certain specified coupons may be deposited with dealers, restrictions are placed on the use and transfer of coupons. Except under the authority of a licence, no person may transfer any coupon to any other person, or accept, or be in possession of, any coupon which is being, or has to his knowledge been, so transferred. The value and period of validity of coupons shall be as prescribed by the Minister.

Restrictions are placed on the use of motor fuel when it has been acquired, and also the use of kerosene, special boiling point spirits, white spirit and rubber solvent.

Persons to whom certain specified coupons have been issued for public utility undertakings, or for trade or business, are required to keep records of motor fuel acquired and used. Methods of test for hydrocarbon oils are prescribed.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

Harbours, Docks and Piers

Road traffic: see p. 66, below.

Hire-Purchase

CONTROL OF HIRING (REBATES) ORDER, 1956 (S.I. No. 1716): operative November 8, 1956. The disposal and possession of goods to which the Hire-Purchase and Credit Sale Agreements (Control) Order, 1956 (S.I. No. 180; [1956] Crim.L.R. 279), applies, under hiring agreements entered into after November 7, 1956, which provide for the making of payments in a certain manner set out in the Order, is prohibited.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

London

The following Orders have been made prohibiting waiting: S.I. 1956, Nos. 1757 (Welwyn Garden City); 1825 (Woking).

Medicine

MEDICAL ACT, 1956 (4 & 5 Eliz. 2, c. 76): operative January 1, 1957. The Act consolidates certain enactments relating to medical practitioners and makes various corrections and improvements in those enactments.

Any person who falsely pretends to be a registered medical practitioner is liable on summary conviction to a fine not exceeding £500 (s. 31).

Any registered or provisionally registered medical practitioner who is convicted of any crime in any court in the United Kingdom or Eire, or who is judged by the Disciplinary Committee of the

General Medical Council to have been guilty of infamous conduct in any professional respect, is liable to have his name erased from the register if the Disciplinary Committee think fit (s. 33).

If the registrar of the General Medical Council or of one of the branch councils for England and Wales, Scotland, or Ireland, wilfully falsifies any matter relating to a register to be kept by him, he shall be guilty of a misdemeanour and liable on conviction to imprisonment for a maximum of twelve months (s. 41 (9)).

Section 55 makes provisions as to penalties in summary proceedings in Scotland, and further provides that any sum of money arising from the recovery of such penalties in Scotland shall be paid to the treasurer of the General Council.

Pest Control

WART DISEASE OF POTATOES (PROTECTED AREA) (GENERAL LICENCE NO. 2) (ENGLAND AND WALES) ORDER, 1956 (S.I. NO. 1719): operative November 7, 1956. The requirements of the Wart Disease of Potatoes Order of 1941 are relaxed for the year 1957 by authorising the planting or sale for planting in certain areas in England of seed potatoes obtained from crops which were not themselves the subject of a prescribed certificate, but were grown in those areas in the previous years from certified stocks.

For penalties for contraventions, see section 1 of the Destructive Insects Act, 1877.

Road Traffic

BRITISH TRANSPORT COMMISSION ACT, 1956 (4 & 5 Eliz. 2, c. lxxiv): operative August 2, 1956. Section 27 extends many important provisions of the Road Traffic Acts, 1930 to 1947, to dock roads, and lays down certain speed restrictions on certain dock roads. Vehicles being used for fire brigade, ambulance or police purposes may ignore the provisions if an emergency warrants this. The term "chief officer of police" shall include the chief police officer of the Transport Commission for the purposes of the Road Traffic Acts as extended by this section.

Sections 50, 51 and 53 require the Commission adequately to light all jetties during and after construction, or in any cases where the jetties have been injured due to destruction or decay, and to take such other steps as may be necessary in order to prevent danger to navigation.

For penalties for contraventions of section 27, see the Road Traffic Act, 1930; and for penalties of contraventions of sections 50, 51 and 53, see the sections themselves.

Scotland

Education (Scotland) Act, 1956 (4 & 5 Eliz. 2, c. 75): operative December 5, 1956. The Education (Scotland) Act, 1946, is amended. Section 3 contains provisions as to enforcement of attendance at school. Where (i) an education authority in the exercise of the powers conferred by section 35 of the principal Act postpone a decision as to whether to prosecute a parent, or (ii) a court before which a prosecution has been brought under section 38 of the principal Act is satisfied that a child has failed without reasonable excuse to attend regularly at school, but does not direct that the child be brought before a juvenile court, then the education authority or the court, as the case may be, may make an attendance order requiring the parent to cause the child to attend the public school which he has been attending, or some other public school named in the attendance order. If the parent fails to comply with this order he is guilty of an offence under section 36 of the principal Act. By section 3 (5) the education authority are empowered to direct that any child of school age who has failed to attend a public school regularly shall be brought before a juvenile court, who may deal with the child in any way provided for under section 38 of the principal Act.

For penalties for contraventions, see section 38 of the Education (Scotland) Act, 1946.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

22. *Drinking beer in private kitchen of licensed premises after hours*

A number of men were found drinking beer in the private kitchen of a public-house after closing time. The licensee explained that the men were personal friends of his and that he had given them the drinks free of charge. The licensee maintained that he was allowed to serve friends or relatives with drinks after closing time provided no money transaction took place. None of the men were residents, but there was no evidence of sale or payment for the drinks.

(1) Is the licensee correct in his explanation?
(2) Am I correct in maintaining that the men could be summoned for consuming drinks after permitted hours?
(3) Does the fact that they were found in a private part of the house alter the situation?
(4) Are there any other offences disclosed? [D.G.T.]

ANSWER

The licensee is no doubt relying on the exemption contained in section 100 (2) (*c*), Licensing Act, 1953, which allows " the supply of intoxicating liquor for consumption on licensed premises to any private friends of the holder of the licence bona fide entertained by him at his own expense, or the consumption of intoxicating liquor by persons so supplied."

In the first place it is to be noted that the friends must be " private," and the entertainment " bona fide." These requirements have the effect of preventing a licensee from escaping the restrictions of the law merely by inviting ordinary customers to remain behind after the end of permitted hours and providing them with free drink (*Corbet* v. *Haigh* (1879) 5 C.P.D. 50). But in any case it is a question of fact whether the persons are " private " friends, and, if so, whether their entertainment is " bona fide." If the facts show—and the burden of proof lies on the licensee—that the persons are not " private " friends, or the entertainment is not " bona fide," then the licensee can be summoned for supplying and the persons for consuming. Each, moreover, can be summoned for aiding and abetting the other party in their offence.

In the second place, the offence is one which can be committed on licensed premises only. It is therefore a question of fact whether the " private kitchen " forms part of the licensed premises or not, to be answered by reference to the terms of the licence granted by the licensing justices. But what is not an offence on the licensed premises (because the guests are proved to be " private " friends, entertained " bona fide " at the licensee's expense) will not be an offence on private premises. Whether the private kitchen is part of the licensed premises or not, is only of importance if the friends are not " private," or the entertainment is not " bona fide." Where the kitchen is part of the licensed premises, then no offences are committed if the guests are " private " friends entertained " bona fide " by the licensee at his own expense; but if these facts are not established, then offences as in the preceeding paragraph are disclosed. On the other hand where the kitchen is *not* part of the licensed premises, no offences are committed by either party, unless there is evidence of sale by the licensee; in which case there is an offence by the licensee of selling without a justice licence, contrary to section 120 (1) (*b*), and by the guests for aiding and abetting this offence. [N. W.]

23. *Endorsement for traffic offences*

Section 6 (1) of the Road Traffic Act, 1930, briefly states " any court before which a person is convicted of any criminal offence in connection with the driving of a motor-vehicle not being an offence under Part IV of this Act, may in any case except where otherwise expressly provided by this Part of this Act and shall, where so required by this Part of this Act," order disqualification or endorsement of licence.

Section 26 (2) of the 1956 Road Traffic Act replaces section 6 (1) of the 1930 Act by providing a schedule of offences for which magistrates may disqualify or endorse.

I have gone carefully into the new Act, and although offences relating to speeding and offences under sections 11 and 12 (dangerous, careless driving) are included in the schedule headed " Offences in respect of which disqualification or endorsement MAY be ordered," it would not appear as though section 5 (1) of the Act of 1934, carrying automatic endorsement unless special reasons were found, for speeding and careless driving offences, has been repealed.

It would therefore appear as though offences under sections 11 or 12 and speeding offences, still carry on conviction automatic endorsement, unless there are special reasons, by virtue of the fact that section 5 (1) of the 1934 Act is still in operation.

I should be glad of your opinion. [H. K.]

ANSWER

Before the Act of 1956 the combined effect of section 6 of the Act of 1930 and section 5 of the Act of 1934 was that the court in cases of careless driving had to endorse if there were no special considerations, and could endorse if there were special considerations. It appears that the position is still the same, with the substitution of section 26 (2) of the Act of 1956 for section 6 of the Act of 1930.

With regard to dangerous driving, under section 11 (2) of the Act of 1930 the court had to endorse in all cases, and presumably the position still remains the same. [D. W. E.]

Letters to the Editor

New Rules for Drafting Indictments

Sir,

You may be interested to see the enclosed correspondence which I have had with the Registrar of the Court of Criminal Appeal.

Yours faithfully,
BERNARD KENYON
Clerk of the Peace.

Wakefield.

To the Registrar of the Court of Criminal Appeal,

Sir,

A study of the practice direction given at the sitting of the Court of Criminal Appeal on November 12 as reported in *The Times* on November 13, 1956, (see p. 41, above) under the above heading has raised two points upon which guidance would be very welcome.

The first point arises where it is known that the accused will be legally represented by counsel instructed by solicitors. In such a case it would seem desirable that his solicitors should receive immediate appropriate notification under the direction and I would propose to arrange accordingly. I should be glad, however, to be advised whether in such cases the direction could be deemed to be satisfied by giving notification only to his solicitors or whether in such cases it would still be deemed to be necessary to serve the accused personally with a notification.

The other point which arises is on the question of " counts additional to the charges on which the accused was committed for trial." Whilst remembering that receiving counts should not automatically be included in an indictment the main count of which alleges stealing, you will appreciate that there are very many cases committed to sessions where the committal has been simply for larceny or housebreaking and larceny and where it is desirable on drafting the indictment to include an alternative count for receiving. I should be glad to be advised whether it is intended that the inclusion in appropriate cases of a count of receiving, such count being alternative to the main count, is or is not to be deemed for the purpose of the direction to be the inclusion of an additional charge.

To the Clerk of the Peace, Wakefield,

Sir,

I have consulted the Lord Chief Justice about your letter of November 14, and he directs me to say that it will be sufficient to notify the solicitor if there is one; and that the practice of including alternative counts of stealing and receiving is so universal and of such long standing that he does not think notice need be given.

Books and Periodicals

Reviews:

Clarke Hall and Morrison's Law Relating to Children and Young Persons. Fifth edition. By A. C. L. Morrison, C.B.E., and L. G. Banwell. London: Butterworth & Co. (Publishers), Ltd. 1956. xl and 703 and (index) 36 pp. (90s. net.)

This excellent reference book first appeared in 1933, on the occasion of the Children and Young Persons Act of that year. It has always professed clear guidance on the law relating to children and young persons, in the form of annotated statute law, statutory instruments and decided cases.

Since the fourth edition in 1951, the Children and Young Persons (Harmful Publications) Act, 1955, has appeared on the Statute-book in order to prevent the dissemination of horror comics. This short Act, as yet untested, came into being after much agitation from societies and people interested in the welfare and protection of young people.

The Children and Young Persons Act, 1956, extends the provisions concerning the escape from fit persons, approved schools and remand homes. It leaves untouched the basic injustice that a child can be brought before a juvenile court on a care or protection summons and, without committing any criminal offence, end up by serving a period of Borstal training. This and other anomalies can be aired before the recently set up Ingleby Committee to consider, *inter alia*, the jurisdiction of juvenile courts and the approved school systems.

Ever since the Curtis Committee Report and the subsequent Children Act in 1948, provisions for the boarding out of children have been the concern of many reformers. The new 1955 Regulations are here set out in full. They do not, however, deal with the fundamental need to increase greatly the payments made to foster parents.

The Adoption Act, 1950, allowed the court to dispense with the consent of parent and guardian in certain circumstances. The decided cases show how narrowly the courts have construed the phrase " unreasonably withheld." Sometimes these decisions seem to be in direct conflict with the splendid directive in section 1 of the Guardianship of Infants Act, 1925, that where any court proceedings are concerned with an infant the court " shall regard the welfare of the infant as the first and paramount consideration."

JEAN GRAHAM HALL.

Stone's Justices' Manual. Eighty-eighth edition. By James Whiteside, Solicitor, Clerk to the Justices, and J. P. Wilson, Solicitor, Clerk to the Justices. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. 1956. Vol. 1, cccxxvii and 1,342 and (index) 223 pp.; Vol. 2, vii and 1,676 and (index) 223 pp. (Thin edition, 84s. 6d. net; thick edition, 79s. 6d. net.)

The 88th edition of this annual volume has been prepared by the same two experienced editors, James Whiteside and J. P. Wilson.

The best that any reviewer can do with a work of this magnitude is to try to make helpful suggestions. First, it is a pleasure to notice that many of the cases on "mental cruelty" and cruelty referred to in a review of the 87th edition ([1955] Crim.L.R. 516) have now been included in the new edition. Further, a suggestion for the inclusion of sections 86 and 87 of the Lunacy Act, 1890, has been adopted.

One of the difficulties of using books of this kind is that of finding what one wants from pages of small type unbroken by headings. The authors are to be congratulated on breaking up some long footnotes with black and italic headings. This could usefully be carried further in other sections of the book, *e.g.*, pp. 1529–1532, footnote (*j*); pp. 1741–1743, footnote (*u*).

The Food and Drugs Act, 1955, received the Royal Assent late in 1955 and although included has not been fully annotated. Regulations under earlier Acts are to be found in the Appendices, but it is to be hoped that the authors will be able to find space to include all the new Regulations, since the 1954 Act, now embodied in the 1955 Act, has left more to be done by regulation.

P. A.

A General History of the Pirates. By Captain Charles Johnson. Edited by Arthur L. Hayward. London: Routledge & Kegan Paul, Ltd. 1956. xvi and 595 and (index) 7 pp. (30s. net.)

There is some doubt whether the author of this book was himself a pirate since the line between action legitimately taken on behalf of the Government or private traders on the one hand and piracy on the other was apt to be blurred during the "age of piracy." Whether or not Johnson was a pirate, his book has been perhaps the most important source-book for many of the stories written about them.

It has been said that Johnson was accurate and in many respects this is true, but it cannot be taken as a fact that his accounts of the lives of the pirates are, in all respects, accurate. Pirates are popularly believed to have been extremely cruel; references to many contemporary documents shows that their cruelty has been over-emphasised. They showed, in all probability, no more cruelty than was common in England and other European countries at that time. Captain Johnson appears to have been a chronicler who, like certain Sunday newspapers, dwelt with relish and exaggeration on certain less pleasant aspects of the pirates' behaviour.

For the pirate historian no introduction to this book is necessary, but for the general reader this book can be highly recommended as a book with a number of very good stories. It is attractively printed and the editor has purged the text of many archaisms that made it difficult to read without spoiling the stories.

P. A.

Criminals in Real Life. By Jim Phelan. London: Burke. 1956. 166 pp. (16s. net.)

Gentlemen at Crime. An autobiography. By Donald MacKenzie. London: Elek Books. 1956. 200 pp. (16s. net.)

The professional criminal in retirement seems nowadays to become increasingly addicted to literature. With every publishing season some ex-burglar may be expected to exchange the jemmy for the fountain-pen and try to prove that if crime does not pay, authorship will. The two books under review are better than average specimens of their kind. The law-abiding reader may be guaranteed in each case some good stories on a subject remote from his ordinary experience. He will enjoy them the more for the way in which they are told, for their authors show a greater respect for the Queen's English than they ever did for her subjects' property.

Criminals in Real Life is Mr. Phelan's eighteenth book. As an author he may be said to have graduated into the professional class, though his habit of composing in two-sentence paragraphs gives his page a decidedly amateurish appearance. The distinction between professionalism and its opposite is one on which Mr. Phelan continually dwells in this lively series of miniature biographies of " wide men." The professional, he insists, is a totally different being from the " steamer " who goes wrong from time to time, though of our prison population the great majority is made up of " steamers." He sums it up in the revealing phrase: " Professional criminals come out of prison. Other people go in."

The secrets of any profession, competently described, are always entertaining. These tales of confidence tricksters and other criminals are all good reading, but the best of them deal with men who added to professional competence some revealing touch of eccentricity, like the master jail breaker who capped a stupendous feat of escaping by sitting on the prison wall shouting, " Ship Ahoy! " One story will remain in the memory long after the rest have been forgotten—the story of " Dick Whittington," who was neither " wide " nor " mug," but simply a lad with a genius for draughtsmanship who drew pound notes when he was hard up, and saw nothing out of the way in the performance. Mr. Phelan does not write on oath, but if he has invented this one he is himself an artist to be reckoned with.

In any event, Mr. Phelan, whose personal tastes would seem to be simple, can look forward to earning his living as a writer indefinitely. Of Mr. Mackenzie it is not so easy to be sure. *Gentlemen at Crime* is only his second book, and like his first, it is autobiographical. What will he do when the supply of personal reminiscences runs out? It is to be hoped that he will not be driven back to his former ways, for, from his own account, he seems to have been an intelligent and highly expert criminal. Starting as an apprentice in the confidence trick—to the outsider, the most fascinating and excusable of offences—he passed to the less attractive occupation of share pushing and thence to the higher reaches of larceny. When he can resist the temptation to overwrite he narrates his adventures plainly and well. He gains the reader's confidence by making some of his best stories from his failures. To lawyers engaged in criminal practice the most interesting will be the one entitled " Old Bailey—Backstage." It is the record of a miscarriage of justice which one earnestly hopes is not true, while feeling in one's bones that it is.

CYRIL HARE.

Books Received:

Country Copper. The Autobiography of Superintendent G. H. Totterdell, C.I.D., of the Essex County Police. London: George G. Harrap & Co., Ltd. 1956. 248 and (appendices) 5 pp. (15s. net.)

A Way of Life. By Peter Wildeblood. London: Weidenfeld & Nicolson. 1956. 191 pp. (18s. net.)

The Hamlyn Lectures: Trial By Jury. By The Honourable Sir Patrick Devlin, one of Her Majesty's Judges in the High Court of Justice. London: Stevens & Sons, Ltd. 1956. viii and 165 and (notes) 14 pp. (15s. net.)

A History of English Criminal Law and its Administration. By Leon Radzinowicz, LL.D., Fellow of Trinity College and Director of the Department of Criminal Science, University of Cambridge. Vol. 2: The clash between private initiative and public interest in the enforcement of the law. Vol. 3: Cross-currents in the movement for the reform of the police. London: Stevens & Sons, Ltd. 1956. Vol. 2: xvii and 427 and (appendices, bibliography, tables and index) 325 pp. Vol. 3: xvii and 474 and (appendices, bibliography, tables and index) 215 pp. (£4 4s. net, each volume.)

Memoirs of a Bow Street Runner. By Henry Goddard. London: Museum Press, Ltd. 1956. xxxi and 253 pp. (18s. net.)

Reader's Digest:

Attempt: Attempt to commit a sexual offence: 100 *Solicitors' Journal* 847.

Betting: The Small Lotteries and Gaming Act, 1956: 106 *Law Journal* 708.

Criminology: Subjects for research: 7 *British Journal of Delinquency* 110.

Criminology: The theory of differential association: 7 *British Journal of Delinquency* 92.

Foreign law: The criminal code promulgated in 1954 in Greenland: 120 *Justice of the Peace* 754.

Larceny: Common law or statutory offence? 120 *Justice of the Peace* 736.

Larceny: Proof of ownership: 106 *Law Journal* 758.

Police: An assessment of the first three-year criminology course organised by Leeds University for policemen: 64 *Police Review* 860.

Police: Delegation of powers of prosecution to the police by local authorities: 64 *Police Review* 784.

Probation: Trends in the training of probation officers: 7 *British Journal of Delinquency* 123.

Trial: A bill of indictment: 100 *Solicitors' Journal* 830.

THE
CRIMINAL LAW
REVIEW

Editors
JOHN BURKE and PETER ALLSOP, M.A.
Barristers-at-Law

Editorial

The case of the houseboat twins

Few cases heard during the last year excited so much feeling and comment as the trial of Mrs. Richardson and Mrs. Clark for the murder of twin boys, aged two. The proceedings were long, the result to many unexpected. Because of the interest aroused by this case we are including an account of it at p. 80.

999 calls

Scotland Yard has opened a new information room to deal with emergency 999 calls. Conveyor belts now carry messages from telephone operators to wireless microphones and then into the telegraph-room for transmission by teleprinters to police stations throughout London. The operator at the microphone has a panel with lights showing which patrol cars are available and the cars will be able to respond to the 999 call in less than a minute. Previously it took nearly two minutes after a call had been received before a message was broadcast.

Good character

In *R.* v. *Warwick and Blakeley*, a case heard by the Court of Criminal Appeal on November 26, 1956, the court refused to quash the convictions of the two accused on the ground that their previous good characters had not been drawn to the attention of the jury by the deputy chairman in his summing-up. In *R.* v. *Aberg* (1948) 32 Cr.App.R. 144 the court had held that there was no obligation on the presiding judge to deal with the question of character to the jury. If there were, it would very soon become known that if the judge did not deal with good character in the summing-up, bad character was to be inferred. In the present case the defendant's previous good character had come out in the evidence and, no doubt, counsel in addressing the jury had stressed it.

Direction to the jury

The direction which should be given to the jury on the burden of proof has been the subject of much discussion in recent months. Must they be "satisfied beyond reasonable doubt" or "sure"? In *R.* v. *Kelly*, a case heard recently at the Central Criminal Court where the prisoner had been charged with receiving a wireless set knowing it to have been stolen, Hilbery J. directed the jury that on the whole of the evidence each member of the jury must feel convinced of the guilt of the prisoner.

"Available" witness

After the dismissal of his application for leave to appeal against conviction on the ground that a witness for the defence was unable to attend the trial ([1956] Crim.L.R. 843), Musial petitioned the Queen. The petition was dismissed on the ground that there was not a sufficient reason for quashing the conviction.

Antique firearms

The Firearms Act, 1937, does not apply to antique firearms (see section 33), but the meaning of "antique" is uncertain; the term is not defined in the Act and there appears to be no case law on the subject.

Recently magistrates at Oxford, hearing summonses of unlawfully selling firearms, had to consider whether certain guns were antiques. Mr. Roger Lees, proof master of the Birmingham Gun Barrel Proof House, said he thought a gun had to be 100 years old before it could be considered antique, and a member of the Gunmakers' Association giving evidence was of the same opinion. This has the merit of being a hard-and-fast rule. The magistrates, however, did not follow it. They dismissed a summons relating to a Belgian sporting rifle said in expert evidence to be "post-1880," but found the defendant guilty on two others, one relating to a Martini Enfield manufactured not earlier than 1904, the other to a Gras French military rifle made in about 1884.[1]

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[1] *The Manchester Guardian*, December 19, 1956.

Prisons

At the beginning of the Report of the Commissioners of Prisons for 1955 [Cmnd. 10] (7s. net) it is remarked that it was "a year about which there is little of special interest to report." The prison population fell to about 20,400 at the end of the year and the number of men sleeping three in a cell in local prisons was reduced to about 2,400. The Commissioners were disturbed by the shortage of staff and the failure to recruit more officers, but there was significant progress in methods of training.

In their Report for 1945 the Commissioners published a memorandum on their proposals for the development of the prison system for adults during the years immediately following the war. The present Report contains a brief review of work in the prisons from that time.

It may be noted that the Report was submitted to the Home Secretary on May 3, 1956, but was not published until December 6.

Road traffic offences

The Return of Offences Relating to Motor Vehicles for 1955 shows a total of 643,855 offences and alleged offences, 35,215 more than in 1954. This increase is accounted for by increases in all types of offences, with few exceptions. Obstruction of the highway (102,970) and exceeding the speed limit in built-up areas (71,239) remained the most frequent types of offences. Disqualification for holding or obtaining driving licences was imposed by magistrates' courts in 24,538 cases; in 18,963 cases it was for a period over six months and up to one year.

Liverpool Prison

Sir Godfrey Russell Vick has completed his report of the inquiry into allegations regarding the ill-treatment of prisoners at Liverpool Prison and the Home Secretary is considering it. The Home Office state: "The report discloses prima facie evidence to support some of the allegations made at the inquiry, but the report cannot be conclusive since, on counsel's advice, the prison officers concerned withheld their answers to the allegations. It will be necessary to consider whether disciplinary charges should be framed against certain officers at the prison, and in the circumstances the Home Secretary has decided that publication of the report must be deferred so long as any such charges as may be brought are *sub judice*." [2]

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[2] See *The Times*, December 22, 1956.

United Nations Congress on crime prevention

The report of the first United Nations Congress on the prevention of crime and the treatment of offenders, held at Geneva from August 22 to September 3, 1955, has been published by the United Nations Department of Economic and Social Affairs (price 9s.).

Parliament

Transcript of evidence

The Home Secretary has given his reasons for refusing a transcript of proceedings against Canter and Robertson to Joseph Grech (see [1957] Crim.L.R. 63). Joseph Grech now proposes to petition for the exercise of the royal prerogative and a copy of the transcript is being lent to his solicitor for the purpose of preparing the proposed petition (H.C. Debates, Vol. 562, col. 612 ; December 13, 1956).

Road traffic

In the report of the committee set up to carry out a survey of parking in inner London emphasis is given to the need for strict enforcement of parking schemes. The Home Secretary is fully in agreement with this, and the Commissioners of Police of the Metropolis and of the City of London have given assurances that they will do their utmost to secure compliance with the law (Vol. 562, col. *59* ; December 12, 1956).

The Home Secretary is not prepared to introduce legislation prescribing minimum fines for road traffic offences (Vol. 562, col. 621 ; December 13, 1956).

Attempted suicide

In 1916 the Metropolitan Police, with the approval of the then Home Secretary, adopted the practice of preferring a charge of attempted suicide only where there is no responsible person able or willing to take charge of the individual concerned, or where special circumstances, such as positive indications of insanity, suggest that the individual should be kept in custody for his own protection. In 1921 this practice was brought to the attention of provincial forces, and the Home Secretary is sending them another circular concerning this matter (Vol. 562, col. 1436 ; December 20, 1956).

Police

The use of cars and motor-cycles by the Metropolitan Police for traffic patrols has been restricted to the essential minimum.

The Commissioner is keeping the position under constant review and motor patrol duties will be adjusted from day to day in the light of prevailing traffic conditions (Vol. 562, col. *205*; December 20, 1956).

On October 31, 1956, the total authorised establishment of police forces in England and Wales was 73,907 male officers and 2,494 women officers; the actual strength was 65,595 men and 2,220 women (Vol. 561, col. *160*; December 6, 1956).

On November 30, 1956, the authorised establishment of the Scottish police forces was 8,468 male and 244 female officers. The actual strengths were 7,810 and 234 respectively (Vol. 562, col. *28*; December 11, 1956).

Detention centres

A second senior detention centre is expected to be opened at Werrington, Staffordshire, by the end of March, 1957. It is proposed to provide a junior and a senior centre in the North of England, but funds may not be available for this purpose in the financial year 1957–1958. The Home Secretary rejected a suggestion that instead of providing such centres he should use any available funds for the provision of remand centres under the Criminal Justice Act, 1948. Apart from considerations of policy, the cost of one remand home would be so much greater than the cost of two detention centres that no useful purpose would be served (Vol. 561, col. *65*; November 29, 1956; Vol. 562, col. 612; December 13, 1956).

Judicial appointments

Mr. George Raymond Hinchcliffe, Q.C., and Mr. Gilbert James Paull, Q.C. have been appointed judges of the High Court in succession to Mr. Justice Sellers and Mr. Justice Ormerod, who have been appointed Lords Justices of Appeal.

Mr. Richard Geraint Rees has been appointed a Metropolitan Magistrate.

Mr. R. B. C. Parnall has been appointed Recorder of the City of Hereford, and Mr. N. J. L. Brodrick, Recorder of the Borough of Penzance.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

The " Houseboat Twins Case "

On May 17, 1956, at about 1 a.m., a houseboat named the " Windmill " at East Creek, South Benfleet, Essex, caught fire and was destroyed. Living on the houseboat at the time of the fire were Mrs. Grace Richardson and her family and a woman known as Mrs. Vicky Wright, whose real name was Mrs. Violet Lavinia Clark, together with the latter's twin sons Colin Malcolm Clark and Reginald Melvyn Clark, who were just over two years old. The twins died in the fire and Mrs. Richardson and Mrs. Clark were subsequently charged with their murder. The case, which began at the Central Criminal Court on October 30, 1956, was one which caught the imagination of the public and became known as the " Houseboat Twins Case." It is probably true to say that, but for the crisis in the Middle East, it was a case which the newspapers would have reported in the fullest possible detail. As it was, only a limited amount of space was available to cover the trial.

Up to about a month before the fire which led to the trial, Mrs. Clark had been living with a man named Reginald Wright on a nearby houseboat called the " Buchra," but on April 17, 1956, Wright had died, and Mrs. Clark then moved to the " Windmill " where she and the twins were given temporary accommodation by the occupants, Mrs. Richardson and her family. On the night of May 15, that is, two days before the " Windmill " fire, the " Buchra " caught fire and was totally destroyed.

Perhaps the most unusual thing about the case was the use of the comparatively rare procedure of applying to a High Court judge for leave to prefer a bill of indictment.[1] This procedure became necessary because Mrs. Richardson was discharged at the close of the committal proceedings before the Southend Magistrates' Court on the ground that there was no evidence against her. Leave to prefer bills of indictment was granted in respect of both Mrs. Richardson and Mrs. Clark, although Mrs. Clark had been committed for trial to the Central Criminal Court by the examining magistrates. This was necessary in order that the accused women could be tried jointly. Mrs. Clark was already in custody, and when Mrs. Richardson was rearrested on the so-called " voluntary " bill of indictment, both women appeared before the Recorder of

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[1] See the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 ; [1954] Crim.L.R. 39.

London (Sir Gerald Dodson) on August 31, 1956, at the Central Criminal Court. The Recorder committed both women for trial in the coming session of the court.

Apart from the use of the "voluntary bill" procedure, two aspects of the trial are particularly noteworthy. First, it was remarkable for the singular lack of direct evidence and for a corresponding wealth of circumstantial evidence together with evidence which, whilst being properly admissible against one prisoner, could well have been prejudicial or even hearsay as regards the other in the minds of the jury. Unlike many prisoners, Mrs. Clark had made no statements in the nature of admissions at any time after the fire. On the contrary, she constantly repeated that she had nothing to do with it and, indeed, there was some evidence that she had to be restrained from going back to the burning boat to save her children. The evidence against Mrs. Clark rested in the main on statements of intention made *before* the fire to Mrs. Richardson and to Mrs. Richardson's children, Ann and Charles. For example, Ann Richardson said in evidence that the day before the fire Mrs. Clark had said it would be a "smashing idea" if the "Windmill" were "to go." The jury also had before them evidence which must have been in their minds and yet was presumably hearsay as against Mrs. Clark, for example, that Mrs. Richardson immediately after the fire had said to a neighbour: "She [Mrs. Clark] has murdered those twins; she never did want them." But perhaps the fact that the jury found manslaughter rather than murder is sufficiently indicative of the paucity of direct evidence against Mrs. Clark. The second aspect of the case which is unusual is the phase that became known as "the trial within a trial." Mrs. Richardson had made a statement to the police which, it is to be supposed, together with other statements made by the Richardson family, formed the basis of the case against her. Counsel for Mrs. Richardson objected to the admissibility of this statement on the main ground that it was improperly obtained by means of a promise. Thus, in the absence of the jury, a trial in miniature took place, "the trial within a trial," during which witnesses were examined and cross-examined and legal argument heard. It is perfectly true that in many cases of objections to evidence being made argument is heard in the absence of the jury, but it must indeed be unusual for a point of such complexity, necessitating the calling of many witnesses including the prisoner, to be taken.

The trial opened at the Central Criminal Court on October 30 before Hilbery J., and it lasted a fortnight. Mr. Gerald Howard, Q.C. and Mr. Maxwell Turner appeared for the Crown. Miss Rose Heilbron, Q.C. and Mr. J. N. Dunlop appeared for Mrs. Clark, and Mr. Edward Clarke defended Mrs. Richardson. Both Mrs. Richardson and Mrs. Clark pleaded Not Guilty to the charge of murdering Colin Malcolm Clark.

The Case Against Mrs. Clark

Mr. Howard, opening the case for the prosecution, alleged that Mrs. Clark's motive for the murder was that she wanted to get rid of the twins in order to go to Australia with a man named Bill Smith. Bill Smith had told Mrs. Clark that he would take her but would not take the twins. It was suggested that she had tried to persuade Mrs. Richardson to take the twins. The jury were told in prosecuting counsel's opening speech that, when the two women reached the bank after the houseboat had caught fire, Mrs. Richardson said to Mrs. Clark: " You killed your babies," to which Mrs. Clark replied: " You loved them, you can have them now."

Miss Ann Charlotte Richardson, aged 18, said in the witness-box that a gallon tin of paraffin was normally kept aboard the " Windmill." Mrs. Clark was always talking about Australia and had said that Smith had been there once and had left her behind. She had then tried to commit suicide; there was never any talk of the twins going to Australia. On May 16, the witness continued, Mrs. Clark said that it would be a " smashing idea " if the " Windmill " was to go. She kept on saying that if the " Windmill " were to go Smith would take her to Australia with him. " And we as a family could have the twins and fetch them up our way " the witness added. Twice on May 16 Mrs. Clark had spoken about putting paraffin on the boat. Some clothing and personal belongings had been carried to another houseboat on May 16; that was because they (the witness's family) were intending to move to another boat.

Miss Heilbron (for Mrs. Clark): Did you ever agree with anybody that there should be a fire?—I never agreed to anything.

Hilbery J.: Would you have remained in the boat that night with your mother and the children if you had known there was going to be a fire?—No.

The witness was then questioned about a written statement she had made to the police on May 30.

Miss Heilbron: Did you say in that statement that you agreed with Vicky (Mrs. Clark) and your mother to put some paraffin down?

The witness: Some things in that statement are not mine. When the statement was made I was just told to write my name on the bottom. Some of it is all lies. I sat at a table at Hornchurch police station and told the officers exactly what I have told you. They kept on to me and some of the things they put down are not true.

Counsel: This is what is written in your statement, " Next morning Vicky kept talking to me and mum and she said 'You would have to set light to your boat.' I told her she could not. She said 'If you set fire to your boat . . . Bill [Smith] would have to find a place for me until we go to Australia.' At first we didn't agree to this but she kept on and on until the next day she drove us to it and we agreed." Did you say that?

The witness: When I said she kept on and on I meant every time she came in she was talking about wanting to burn the " Windmill," but I never said that we agreed.

Were you not trying to throw the blame on to Mrs. Clark for something you and your family had arranged?—No.

And is not that what you are trying to do today?—No, I don't know who did it.

Did you say in your statement " We arranged that she [Mrs. Clark] should put a match to it and call us before the fire got too bad "?—No.

Did not one of your family light the fire?—No.

And did you also say " We didn't intend to let the twins die but Vicky was too late and panicked . . . " ?—No.

Cross-examined by Mr. Edward Clarke (for Mrs. Richardson) the witness (Miss Richardson) said that Mrs. Clark used to talk about a man named Bill Smith and a Steve Taylor, the father of the twins. Her mother, she continued, never agreed with Mrs. Clark's suggestion at any time that the " Windmill " should be burnt. On that night of the fire her mother was doing her best to save the twins; she worshipped them.

Charles Richardson, Mrs. Richardson's 16-year-old son, gave similar evidence.

Evidence was given by Cyril Gordon Sanders, fireman, of the finding of the bodies of the twins. They were not beneath the floorboards, he said.

Dr. I. C. Holden, senior scientific officer at the Metropolitan police laboratory, said in evidence that he had examined the " Windmill " but found no cause for the fire at all. There was no indication, he said, of any natural origin for the fire.

Mrs. Winifred Gertrude Bowling, of the houseboat MTB. 492, giving evidence said that in 1955 Mrs. Clark had tried to commit suicide in her (the witness's) boat. The trouble was over a man named Bill Smith who had gone to Australia, but had since returned. After the " Windmill " fire she attended to a slight burn on Mrs. Richardson's left arm. Mrs. Richardson said to her, " That bitch [Mrs. Clark], she has murdered those twins, she never did want them. If I could get my hands on her I would kill her." She also told the witness that during the evening, round the tea-table, Bill Smith had said that the twins were beautiful babies and could be sold to the Americans for £100 apiece.

Mr. Turner: Did she say anything else about Mrs. Clark at the time of the fire?—She said that Mrs. Clark stopped the escape from the bedroom with a basket which contained Mrs. Clark's clothes and a bag and a cheque book which Mr. Smith had given to her, to the value of £40 or £50. It was that basket which was blocking the window. Mrs. Richardson did not exactly tell her how the fire started but said, " she " started it, meaning presumably, Mrs. Clark. Mrs. Richardson was extremely distressed.

Miss Heilbron (for Mrs. Clark): In point of fact you dislike Mrs. Clark intensely?—That is extremely wrong and I am anxious to say so.

Do you like her?—Until this case I have had no reason to dislike Mrs. Clark.

Did you not complain to Mr. Wright that your husband was seeing too much of Mrs. Clark?—I certainly did not, my husband is above that.

Did Mrs. Clark on occasions lend you money in years gone by? —Yes, and I have lent her money in a neighbourly way.

Did you ever say you were going to get the " Windmill " crowd off the creek and then deal with Mrs. Clark?—I did not.

George Reeves of the motor-boat Congi, giving evidence said that on the night of the fire he heard cries for help and Mrs. Clark shouting " Murder, murder." On reaching the " Windmill " he found the Richardsons panic-stricken. Mrs. Richardson was saying, " She has done it, she has done it at last. She never did want those babies."

The witness said that he later accused Mrs. Clark of starting the fire. Mrs. Clark replied, " I did not do it, I did not do it George. Don't you believe that as well as the others." She also said that the fire had started at the bottom of her bed. Mrs. Richardson kept repeating, " I will kill her if I get hold of her." Mrs. Richardson said that she managed to grab one of the twins but Vicky rushed past her with a basket and knocked the child out of her hand. She also alleged that Vicky had stood on one of the twins in a further attempt to get out of the window.

Cross-examined by Miss Heilbron the witness agreed that Mrs. Clark had to be restrained because it was feared she might dash back into the fire because the twins were there.

Police-constable Wall in evidence said that while the " Windmill " was burning fiercely Mrs. Clark was pleading with a police officer to let her go back to the boat because her babies wanted her. Later at the Bowlings' houseboat the witness asked Mrs. Richardson how the fire had started and she replied, " I am not definitely sure, but Vicky knows more than she says she does. . . ." Asked what she meant by that Mrs. Richardson said that she " might as well tell all she knew as it would come out. Mrs. Wright's real name was Clark and her legal husband was living at Canvey Island." She went on to say that Mrs. Clark had been living with a man named Wright for quite a long period right up until Mr. Wright's death a month previously, and for several years she had been associating with a man called Bill Smith. She also said there was talk of Mrs. Clark going to Australia with Smith but he would not take the twins and they would have to stay behind.

The witness further stated that Mrs. Richardson alleged that Mrs. Clark made no attempt to save the children and at one stage Mrs. Clark put her foot on one of the twins to prevent him being rescued. Mrs. Richardson, said the witness, added that she tried herself to save the babies. Later, he saw Mrs. Clark and asked her how the fire started. She replied, " I didn't do it, I didn't do it, you don't think I want to kill my own babies." She also mentioned receiving anonymous letters and inquired if her passport had been saved from the fire. " I should not say Mrs. Clark's condition was that of a normal mother's concern," said the witness.

Concerning the allegation that Mrs. Clark had put her foot on one of the babies Miss Heilbron asked: " That would be a diabolical thing for a mother to do? " The witness replied: " It would."

Anonymous Letters

Detective-sergeant Sewell, giving evidence, said that he had interviewed Mrs. Richardson about two anonymous letters which had been sent to Scotland Yard and to the wife of Bill Smith. After her handwriting had been compared with the handwriting in the letters Mrs. Richardson admitted that she had written them.

Despite objections by Mr. Clarke (for Mrs. Richardson) Miss Heilbron insisted that the two anonymous letters be read in open court for the purpose of showing that Mrs. Richardson had been making false accusations of other matters a month prior to the fires. The first was addressed to Scotland Yard and read:—

> I know you hate anonymous letters, but you must understand it is the only way for police to get to know the truth. Perhaps you could try to see justice done to a dead man, if you brave men can resist the snare of her [Wright's] eyes. She has dealings with men galore. Please don't be fascinated. I would not have worried, but this terrible traitress is after, or rather started on another man. He will not stay with his wife much longer.
>
> There is a mile-long story of this prostitute called Vicky as all the men know her. The woman I am writing about is called Mrs. Wright. She has no right to that name as she was never married to poor dear Reg [Reginald Wright] with whom Vicky Wright lived.
>
> Well, Vicky has never been any good and never will be. She was married to a man named Clark and after a few weeks of married life he, poor devil, found out she was not only a dirty little prostitute, but a she-devil as well. After a few years she went off and left him with her children. She never went near him again.
>
> After she left her husband, she still carried on with her man and went to live with her mother at Westcliff because there was a lodger there who had a good business and was rolling in money. He bought Vicky beautiful fur coats, clothes and jewellery. Then he bought a boat and it is called " Buchra."

After a number of references to the ownership of " Buchra," the letter went on:—

> After she lived with poor Reginald Wright for a while, he found out what she was. She has twin boys, but Reg knew he was not the father. So for the last three years she was a devil. He worked hard, and although he knew the boys did not belong to him he grew to love them.
>
> He worked the long hours and worked hard and gave her all his money. She never did any work. He went to work hungry. He was pleased when last October some people moved in the " Windmill " houseboat and they had the children up there from early morning until it was time for the kiddies to go to bed at night.
>
> Vicky never went out so much in all her life. . . . You see, she was out with her rich lover. This other man is very wealthy and she had already ruined poor Reg. In January this year Reg, half-starved, his health broke. He had heart trouble, so the doctor said. She used to row with him so much he used to go out for a walk out of her way.

The letter alleged that Vicky had tried to commit suicide twice, and continued:—

> Ever since, she has wanted poor innocent Reg out of the way. He never hurt a soul. She was always wishing him dead. Everybody knew she starved him. But did she tamper with his medicine he used to take? He was always complaining to people that now and again his bottles of medicine or cough mixture that he bought himself from the chemist tasted peculiar.
>
> It was not the doctor's blue medicine which made Reg feel ill. You bet she has got rid of the medicine and cough mixture he used to buy. They had a shocking row nearly three weeks ago over the medicine tasting funny. He walked out and collapsed at the gate and died on the way to hospital. The new rich lover took her out in his car the next day.

After saying none of Mr. Wright's family knew he had died the letter added:—

> No one on Canvey or Benfleet knew when he was buried. It was people who were passing the church and saw the wealthy lover go up to her and he stood with her until the body of poor Reg was taken in church. Then her and another woman, the only two women mourners went into the church.

The second letter, addressed to Mrs. Bill Smith read:—

> Dear Friend, I am calling you that as you have the sympathy and understanding of all who have seen your husband out with that dirty prostitute called Vicky. Your husband used to meet her in secret though Reg was alive. Your husband thought he was her only lover. But not Vicky. She picks all the married men. They all know her.
>
> The day after poor, dear hardworking Reg Wright died, whom you know she starved to death, your husband proudly walked beside her up the East Creek, Benfleet, to the dead man's boat where the haybag lives. She has been going about with him in his car. He does not know the poor conceited fool, that his fancy piece of goods is well known as a prostitute. The men in the Creek have gone to her boat at night when Reg was at work.
>
> Poor dear Reg knew the twin boys were not his. When he found out who was the father he threatened to tell people but she was slowly sending the man to his grave. She had all his money and the boys and himself were hungry while she was

> out every day and evening enjoying herself. We are all waiting for your husband to run off somewhere with this haybag.
>
> Don't worry about the twins. She has them up at a boat called the "Windmill" since the day that poor man died. I am telling the owner of the "Windmill" and I will see that the woman and her family are off the Creek.
>
> I'll make them sorry they stuck up for Vicky. We will see the people out and then your husband and his mistress won't have the love-nest to themselves.

No Case Against Mrs. Richardson

On May 18 Mrs. Richardson made a written statement to the police. Part of this statement was opened to the jury by counsel for the prosecution and this presumably would have formed the basis of Mrs. Richardson's evidence had it become necessary for her to go into the witness-box. In this statement Mrs. Richardson said that in April Mrs. Clark told her that she had been friendly with a Bill Smith for over ten years, that he had said he loved her, and that he was going to leave his wife and look after her. "She told me that Smith would not take the children. . . . She said she had built her hopes up of me having the twins and that she would sign a paper before she left saying she would never want to see them any more and would have no further claim on them." The statement continued: "The following day Bill Smith came to the boat and we had a discussion about the twins being adopted. Vicky told Smith that my husband would not have the twins unless it was done legally. Smith said that if we would not have them it didn't matter and he added 'I'll take them to an American air base. I can sell them for about £100 each. You will get a good price for them, they are beautiful kids.'"

On the night of the fire, the statement went on, there was a gallon can of paraffin in the living room where Mrs. Clark was sleeping. "I jumped out of bed and saw Vicky standing in the doorway of my bedroom. Behind her I could see flames shooting up from the floor. Vicky had all her clothes over her arm and was carrying a basket with her handbag. . . . It seemed she was only concerned with saving her own property. . . . I said 'Never mind the clothes, get the twins.' I had Reggie under my arm and she [Mrs. Clark] said 'my clothes' and elbowed me. That caused me to drop Reggie and he dropped on to the bunk and he fell into the flames which had burnt the floorboards. The bunk fell into the well of the boat where it was burning fiercely. . . . My family pulled me out. When I got outside I saw Vicky searching around looking for her handbag. I said 'You have killed your babies, you knocked one out of my arms.' She replied 'You loved them, you can have them now.' I said 'They have gone you have killed them, I don't want them now.' I threatened to kill her for what she had done. I am perfectly sure if Vicky had not bothered about her clothes and handbag the children could easily have been saved."

On May 30 Mrs. Richardson made a further statement which was not opened to the jury. The contents of this statement were never made public, but it is to be supposed that, together with other statements made by the Richardson family, this document formed the basis of the case for the prosecution. It was to this statement that objections regarding admissibility were made. In the absence of the jury, two police officers, Detective-sergeant Sewell and Superintendent Barkway, gave evidence that Mrs. Richardson together with Ann and Charles Richardson were taken to Hornchurch police station on May 30 at about 6 p.m. Mrs. Richardson was detained there until 2 a.m. although Charles was allowed to go earlier. They denied that any promise had been made to Mrs. Richardson to induce her to make a statement. They denied that Mrs. Richardson had been collected from the hostel where she was staying earlier than 5.30, arriving at the police station at about 6 p.m. Mrs. Richardson herself gave evidence that she was collected from the hostel at about 4 p.m., arriving at the police station at about 4.30. She said that no one spoke to her for four hours and that she was detained there until 2 a.m. She said that she had been given no food or drink during the whole of that period, and that the officers had told her she could go if she would make a statement telling them the truth. She also said that Ann and Charles had each been sent in to see her in order to try to persuade her to make a confession. Both Ann and Charles Richardson gave evidence corroborating their mother. In addition the keeper of the hostel where Mrs. Richardson had obtained temporary accommodation was called. He produced the record-book for the day and said that he remembered the police calling to collect Mrs. Richardson. He said that it must have been before 4.30 p.m. because that was the time he went off duty, but he thought it was around 4 p.m. as he remembered the children coming out of school. The hostel-keeper's evidence was corroborated by four other witnesses from the hostel. On this evidence, it was submitted by counsel for Mrs. Richardson that the statement was inadmissible. Hilbery J. upheld that submission but gave no reasons for so doing.

Apart from Mrs. Richardson's statement, the case against her consisted of two fragmentary pieces of evidence. First, that on the day preceding the fire in the "Windmill" she had bought a can of paraffin, and secondly that she had transferred a quantity of clothing from the "Windmill" to another houseboat. Counsel for Mrs. Richardson (Mr. Clarke) therefore submitted at the close of the case for the prosecution that there was no case against her. Counsel for the Crown agreed that there was no evidence against her either on the charge of murder or of manslaughter. The judge said that, in respect of the paraffin, there was no evidence to show that this was bought for other than a lawful purpose and he ruled that there was no case.

The judge directed the jury to find Mrs. Richardson Not Guilty on the indictment. The Crown then offered no evidence against her on the second indictment charging the murder of the other twin and again the jury were directed to return a verdict of Not Guilty. Mrs. Richardson was then formally discharged.

Mrs. Clark's Evidence

Mrs. Clark, giving evidence said that she had always done her best for the twins. After Wright died in April she and the twins went to live in the houseboat "Windmill" with the Richardsons. She had known a man named Bill Smith for ten years but had never been intimate with him. She denied there was any intention of going to Australia with Smith, or that he had said he was unwilling to take the twins when they went. On the contrary, she had applied to the local authority for a house or a bungalow.

Miss Heilbron: It has been alleged by Ann Richardson that at breakfast time on May 16 you said it would be a "smashing idea" if the "Windmill" were "to go."—I said nothing of the kind.

She also alleged that you said if the "Windmill" were "to go" you would be taken to Australia, and that the Richardson family could have the housboat "Intruder" and the twins.—That conversation did not take place.

Is there any truth in the suggestion that you mentioned setting fire to the "Windmill" by putting paraffin down?—No.

The witness said that when she went to bed that night in the "Windmill" Mrs. Richardson put her arm round her neck and said, "Good night, girl, don't worry."

Counsel: What was the next thing that happened?

The witness: I was awakened by a noise and for a second or two I did not pay any attention and I did not even open my eyes. Then I saw a huge red reflection on the floor of the living room. I sat up in bed quickly and the cat fell off the bed. I saw the window frame and the curtains were alight. I jumped out of bed and as I put my slippers on I screamed. . . . Mrs. Richardson was standing by the side of her bed in her bedroom. . . . I thought Mrs. Richardson and Ann Richardson would be getting the children off the boat. I went to the water butt and got a jug and threw it over the window, thinking I could put the fire out while the adults were seeing to the children. I saw it was hopeless and I tried to grab the curtains which were blazing but could not and they fell down and set light to my bed. After that the fire spread rapidly. . . . I grabbed a basket and threw the twins' shoes into it because I knew they would need them. I grabbed some clothes and threw them over the basket and went into the bedroom. Mrs. Richardson was standing there and she said, " Never mind that, get out." She grabbed the basket and pushed me through the window, I said, " What about the children? " and Mrs. Richardson replied, " We are seeing to them ; don't worry."

Hilbery J.: Could you not see the twins sitting up in the bunks? It was only a 6ft. room.

The witness: I saw nobody, only Mrs. Richardson. I thought the twins were off. Mrs. Richardson pushed me out of the window and I fell down the ladder. . . . I asked Charles Richardson: " Where are the twins? " and he said: " On the boat," but added: " Never mind, I will go back," and he went back into the boat and called out that he and his mother would pass the twins to me.

Continuing, the witness said that when she saw Charles again she asked him: " Where are my babies? " and he replied: " I can't find them, I can't get to them." The witness went on: I was in an awful state. I ran along the creek screaming for help. . . . Several men ran to the boat. I could not see the twins and decided to go back myself and get them because nobody else had got them. The policeman ran after me and caught me and said I would never get there and the firemen would get them. I kept on screaming, I wanted to go back. . . . Then four men held me against the fence.

Questioned about a man named Bill Smith who went to Australia (but had since returned) the witness said: " I was upset when he went because we were good friends and I wondered why he had not told me he was going. . . . He had been like a father to me. . . ."

Counsel: Did you have anything to do with the setting fire to the " Windmill " ?—No, I did not.

Asked by Mr. Turner (in cross-examination) why, when she applied for a passport in December, 1954, to replace the one she had lost in the floods in 1953, she had stated she intended going to

Australia, the witness replied: "I wasn't going anywhere. I just wrote down 'Australia.'"

Counsel: The passport was posted to Mr. Smith, c/o the Westminster Bank. Was that because you were going to Australia with Bill Smith and did not want Mr. Wright (the man with whom Mrs. Clark was living at the time) to know you were getting a passport? —I never intended going anywhere with Mr. Smith. It was more or less vanity on my part that I applied for the passport.

The judge: Were you intimate with Smith?—No, I was working for him. He owned a café in which all his family and I worked.

The witness was then asked about a letter she had written to Bill Smith after he had gone to Australia.

Mr. Turner: In that letter did you say, "You have done the very thing you promised never to do"?—I was upset because he had gone off without telling me. He had always treated me like a father.

And did you say, "No matter how you have deceived me I will always love you and if you ever come back I will be waiting because deep in my heart I still cannot believe you could do such a despicable thing to me"? Is that a father's love?—Yes.

The judge: What was such a despicable thing?—Going away without telling me.

Counsel: And did you say, "Anyway it is not the sort of thing my Bill said he would do." Do you mean it is not the kind of thing a father would do?—Yes.

And do you go on, "I have tried to think of a reasonable excuse for you, but alas I can find none, but I keep hearing you say 'If I cannot take you then I shan't go.'" Had he said that?—He had not.

If Mr. Smith never said that then this letter would be rubbish to him?—Mr. Smith never received the letter.

In the letter do you say, "Are you really no better than the rest? I prefer to think that you are better, but I find it very hard; after all, you must have known all along that you had no intention of carrying out your many promises." What do you mean "He is no better than the rest"?—He was like a father, but other men I have known have been entirely different. I always thought he was kind and considerate.

The judge: You mean the rest of the men you had been intimate with?—I have not been intimate with every man I have met.

Counsel: And did you write in the letter, "I thought you were in love with me"? Did you mean a father's love?—He has always been like father to me. We have always been like father and daughter.

The judge: Did you think Bill Smith was in love with you?—No.

Then why put it in the letter?—Mrs. Bowling had said, "Let's do something to upset him."

Counsel: And, finally, did you write in the letter, "It has hurt me to have to write this letter, darling, because I love you with all my heart, and always will. Take care of yourself, because we were meant for each other. There is only one love for everyone, and you are mine. In time, maybe I can forgive what you have done because I still have faith in you and you will aways be my Bill and I will always be waiting for you. Nothing will ever kill my love for you. . . ." Did you mean by that the love of a father for a daughter?—Nothing was meant by that letter at all. I have already explained, it was written to make his wife believe there was more to it.

Final Speeches, Summing-up and Verdict

Final speeches

Mr. Howard presented the case to the jury in his opening speech as one of murder, and did not suggest that the Crown might seek any other verdict. In his final speech, however, Mr. Turner, whilst still putting forward the case as one of murder, dealt with the alternative verdict of manslaughter. Dealing with the case against Mrs. Clark on murder, he reminded the jury of what Ann Richardson alleged that Mrs. Clark had said the day before the fire: "If the 'Windmill' was to go Bill would take me to Australia and you [the Richardsons] could have the twins. . . . I could put some paraffin down." In order to establish a case of murder, he submitted, the prosecution had to prove that this fire was deliberate and not accidental, and that Mrs. Clark was a party to it, and further, that a reasonable person must have realised that such a fire involved danger to life or limb. It was not necessary, for the purpose of proving this so-called "constructive" murder, to show that Mrs. Clark wanted to kill the twins. There were two ways, said Mr. Turner, in which the jury might return the alternative verdict of manslaughter. First, if Mrs. Clark were a party to the fire but could not as a reasonable person have contemplated that danger to life or limb was likely to result (voluntary manslaughter), and second, if this was an accidental fire and Mrs. Clark had been guilty of such gross neglect in not trying to save her babies as to amount to an utter disregard for their life and safety (involuntary manslaughter).

In her final speech for the defence Miss Heilbron said that Mrs. Clark was hated all along the creek at South Benfleet with a malevolence and spite that was hard to believe until one read the " poison pen " letters written by Mrs. Richardson. Ann and Charles Richardson had the strongest possible motive for falsifying their evidence. The Richardson family were professing friendship for Mrs. Clark, Mrs. Richardson was kissing her every night, yet she was the person writing the anonymous letters. Had the jury ever heard of such two-faced conduct before? counsel asked. Referring to the death of the twins in the fire Miss Heilbron said: " It is all very well to lay all the blame on Mrs. Clark. But don't forget that two able-bodied young people got out of the houseboat before those two babies. Mrs. Clark has had to fight prejudice, blame and lies. She has had to take it all on her own shoulders." The evidence of the Richardson children was in effect the mainstay of the case for the prosecution. That evidence exonerated Mrs. Richardson at the expense of Mrs. Clark.

Summing up

Summing up the judge said: " Does the evidence show that the fire was wilfully started or does it leave it uncertain so that you might think it was accidental? We have not heard it seriously suggested by anyone that it was an accidental fire." If the jury were uncertain as to whether the fire was wilfully caused they would bring in a verdict of Not Guilty of murder. They would still have to consider if, when the fire did occur, Mrs. Clark showed a criminal degree of negligence towards her own two children in failing to do any act to get them out of the fire. She did not suggest that she did anything to get them out.

The jury had to decide, if they were satisfied that the fire was not an accident, whether Mrs. Clark was the person who started it.

The prosecution case was this: They said the accused had a motive. The question was: Had she a motive that moved her so strongly that she did the act? Mrs. Clark had said that for ten years she had had a friendship with Bill Smith. The prosecution alleged that Mrs. Clark had explored the possibility of getting the twins off her hands by having the Richardsons adopt them and that when this failed she attempted to force Smith's hand by destroying her place of residence.

The defence was that it was untrue that she contemplated or wanted to get rid of the twins, or that she had any idea of going to Australia with Bill Smith, and that she never had any idea of getting the twins off her hands.

The jury would have to decide whether Mrs. Clark was nursing a hope she had entertained in 1955 and which had been denied her, that if Bill Smith went to Australia she would be going with him.

If the jury were not satisfied with the case for the prosecution on murder they would have to consider the alternative of manslaughter. Was Mrs. Clark guilty of a criminal neglect of her duty to her children to do what she could to save them? If that was their view they would find her guilty of manslaughter.

Verdict

After considering their verdict for forty-seven minutes the jury found Mrs. Clark Guilty of manslaughter.

Further indictments against Mrs. Clark charging her with the murder of Reginald Melvyn Clark, the other twin, and with arson, were ordered to be left on the file marked " not to be proceeded with without leave of the court."

Passing sentence of three years' imprisonment the judge said: " I think the jury is quite right, and have shown good judgment and good sense in saying you were guilty of a complete and criminal neglect for the life of the children who died in the fire. It is perfectly clear from your own evidence that you did nothing to save the children but took successful steps to save yourself."

On November 19, at the request of her legal advisers, Mrs. Clark again appeared at the Central Criminal Court to answer the two indictments which had been left on the file at her trial. To the charge of murdering her second twin, Reginald, she pleaded Not Guilty, but she offered a plea of Guilty of manslaughter. That plea was accepted. She further pleaded Not Guilty to arson of the " Windmill." The Crown called no evidence on either charge.

In directing the jury to return verdicts of Not Guilty, Hilbery J. said that finding Mrs. Clark Not Guilty of the murder of her first twin, Colin, meant that the jury at her trial were not satisfied that she started the fire in the " Windmill." (That negatived the charge of murder.) It would be pointless, therefore, said the judge, for another jury to try her on the arson charge because that would involve exactly the same facts. He directed the jury to return formal verdicts of Not Guilty. His Lordship then sentenced Mrs. Clark to three years' imprisonment for the manslaughter of the second twin, Reginald, the sentence to run concurrently with the three years' sentence already passed on her for the manslaughter of Colin, her first twin.

Notice of application for leave to appeal against her conviction and sentence in the case of each twin was lodged on behalf of Mrs. Clark on November 23, but the application was withdrawn on November 30.

Larceny by a Trick and Contract

By Wing Commander J. T. Lowe, ll.b., *Barrister-at-Law*

(Continued from p. 36)

An erroneous doctrine of contract

It is said that *R.* v. *Pear* (1779) 1 Leach 212 was a fiction because it enunciated an erroneous doctrine of contract. The criticism in this connection has concerned itself with the arguments of the trial judge and Eyre B. at the debate. The trial judge is recorded to have said:

> " Wherever there is a real and bona fide contract and a delivery, and afterwards the goods are converted to the party's own use; that is not a felony. But if there is no real and bona fide contract, if the understanding of the parties be not the same, the contract is a mere pretence, and the taking is a taking with intent to commit a felony."

Eyre B. is reported to have said:—

> " If the possession were obtained by fraud, and not taken according to the agreement; it was on the whole a taking against the will of the owner, and if done *animo furandi,* it was felony."

When the passage of the trial judge quoted above is compared with his direction at the trial the similarity is obvious. Both are concerned with the mental state of the prisoner; they are an exploration of the prisoner's state of mind. They lay down that whether the prisoner was to be regarded as an innocent possessor under a contract of bailment was to be determined by his state of mind at the time he received the mare. Significantly enough in this connection Ashurst J. uses the words " real and bona fide " and later the word " pretence." The words of Eyre B. are similarly applicable to the mental state of the prisoner, and bear a striking resemblance to the argument of Laken J. in the *Carrier's* case.

None of the other judges at the debate made any pronouncement at all upon the law of civil contract. They addressed themselves to the manner of the taking. They pointed out that in *Tunnard's Case* (1729) 2 East P.C. 687 Lord Raymond C.J. left to the jury to consider whether Tunnard rode away the horse with an intent to steal her. They then added that a taking need not be by force, and instanced the case of an entering by fraud in burglary. They then stated that in all cases it was the intention that had to be considered, and that fraud supplied the place of force. What that intention was, was in all cases, a question of fact which had to be left with the jury.

If, then, the prisoner's state of mind was the sole issue how could the validity or non-validity of any contract of bailment affect the point? What had to be determined was whether the prisoner was an innocent possessor, and a contract of bailment could not affect this issue. A contract cannot change a state of mind. It was a maxim of the civil law "*nemo potest causam possessionis mutare*," and similarly it may be said: "*contractus non potest animum furandi mutare*." [1-3] The original animus was decisive.

A void contract of bailment

Was there, indeed, any valid contract of bailment? Since the case decided that Pear was a trespasser it would appear that the contract of bailment was void *ab initio*. Was this an invention, a twist of well-settled principles of the law of civil contract, or was the common law guided by a true contractual instinct in cancelling the *vinculum juris*?

It must be conceded that the law of mistake in contract on the common law side is a very modern one, and the courts instead of defining with precision the law of mistake have been content to proceed on empirical lines and to deal with cases as they have arisen. *Hardman* v. *Booth* (1863) 1 H. & C. 803 was such a case; *Cundy* v. *Lindsay* (1878) 3 App.Cas. 459 was another, and are there not grounds for arguing that *R.* v. *Pear* was another earlier case falling within this empirical list? In that case a contract of bailment was involved. Patently here was fraud of a most blatant kind under the cloak of a contract. Whilst the common law was prepared to recognise the immunity which a contract of bailment afforded where a party had entered into a genuine contract of bailment, it was not prepared to spell out such a contract where it was clear that the party's real intention from the beginning was fraudulently to convert the *jus possidendi* granted to him into an entire dominion over the thing. It declared that the *jus possidendi* never came into existence, and that the receipt *animo furandi* was a trespass.

Could the law of mistake have been properly invoked here in order to avoid the contract? Such doctrine of mistake as the common law recognises appears to be mistake of a unilateral kind.[4]

[1-3] No one can change the reason of possession; the contract cannot change the intent to steal.

[4] See Cheshire & Fifoot, *Law of Contract*, 4th ed., at pp. 187–204, where it is pointed out that the common law does not recognise any doctrine of mutual mistake. It recognises only unilateral mistake where the element of fraud or sharp practice is present.

What is important to notice in these rare cases is that what avoids the contract is fraud. Certainly there is an absence of *consensus ad idem* in such cases, but it is not that which, of itself, avoids the contract but fraud.[5] Such fraud will avoid the contract if it is of such a fundamental nature as to change in essential the contract itself, making it to the knowledge of the deceiving party a contract of an entirely different kind from that stipulated between the parties.[6] How then does the case of *R.* v. *Pear* stand within this circumscribed limit?

Physical delivery of a chattel may mean many things. It may mean the transfer of dominion or it may mean the creation of a *jus possidendi* for a limited period. Thus in the common form of a delivery may be involved the transfer of rights of a fundamentally different nature. In this common objective form of the contract the prosecutor's mind was contemplating one thing, whilst that of the prisoner was fraudulently contemplating something entirely different. The prosecutor said in effect: "I grant you possession for a limited period." The prisoner's fraudulent intent was formulated thus: "You contract to grant me possession and I objectively contract to receive it, but my fraudulent intent embraces more than your contract; it embraces an out and out dominion."

Let us take the case of a formal contract where A agrees to let B a house for, say, two years. B objectively agrees but fraudulently submits to A for signature a conveyance in fee simple. A thinking it to be a lease signs it. Without entering into any detailed argument as to whether the deed so signed is void *ab initio* or whether it is merely voidable it is evident that we have here something more than a mere error *in causa*.[7] To argue the validity of the bailment in *Pear's* case from the analogous rule applying to the case where the deceived party intends to part with his property in the thing is, it is submitted, to place the transaction in a category which is not *in pari materia*. Was not the prosecutor deceived in something more than the honesty of Pear; was he not deceived by the real nature of the transaction? [8]

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[5] If *consensus ad idem* was the decisive factor then mutual mistake should be treated in the same way as unilateral mistake, but in mutual mistake the common law will enforce an objective contract irrespective of the actual intent of the parties. See, *e.g.*, *Scott* v. *Littledale* (1858) 8 E. & B. 815 and *Sullivan* v. *Constable* (1932) 48 T.L.R. 369.

[6] Exemplified in such cases as *Hardman* v. *Booth* and *Cundy* v. *Lindsay*, above, and *Smith* v. *Hughes* (1871) L.R. 6 Q.B. 597.

[7] Whether the conveyance is void *ab initio* would depend apparently on whether it could be said to be an instrument of a totally different description. Probably as A knew that it dealt with his property, and having regard to the case of *Howatson* v. *Webb* [1907] 1 Ch. 537 it would be held to be merely voidable. See Cheshire & Fifoot, *Law of Contract*, 4th ed., at p. 206.

The unwarrantable extension of R. v. *Pear*

That the criminal law evolved from the case of *R.* v. *Pear* an erroneous doctrine of contract cannot be denied. This was due to the sporadic attempt of the criminal judges to extend the case beyond its true limits. Thus in the case of *R.* v. *Russett* [1892] 2 Q.B. 312 larceny by a trick was described as follows (at p. 314):—

"If the possession of the money or goods said to have been stolen has been parted with, but the owner did not intend to part with the property in them, so that part of the transaction is incomplete, and the parting with the possession has been obtained by fraud—that is larceny."

Now in point of fact there was no question at all of a contract which was not complete, for there was no intention at all to pass the property in the horse. The contract was one of pure bailment. The principle became enmeshed in cases where there was an intention to pass both the property and the possession, and where consequently there was no error as to the nature of the transaction, nor indeed about anything else except the honesty of the fraudulent party. The difference between these cases and that of Pear was obvious; in the former the prosecutor consented to be deprived of his property in the thing, whereas in the latter case the prosecutor never consented to part with the property at all.

It would be out of place to examine at length the cases in which the principle of *Pear's* case was wrongly extended. Let one such case suffice. Take, for example, the case of *R.* v. *Buckmaster* (1887) 20 Q.B. 182. The facts of that case are so well known that they do not need repetition. In that case Lord Coleridge C.J. said:—

> "Supposing there was an intention on the part of the prosecutor to part with the property in the money [9] in order to pass that property from the prosecutor to the prisoner there must be a contract, that is, the bringing together of two minds, but here there was nothing in the shape of a contract by which the property could pass, for if the prosecutor meant to part with the money it was on the terms that the prisoner should

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[8] It is interesting to consider whether such a contract would have been void in Roman law. Thus where A was contracting on the footing of a loan and B of sale the contract was void on the ground of mutual error. Would it have made any difference if B objectively contracted on the footing of a loan but secretly intended to exercise the right of *dominus*?

[9] Thus marking the case off from that of *R.* v. *Pear*.

> do something with it, that is, should return the money to the prosecutor if the horse won. But the prisoner did not do so, and never intended to do so."

It is presumed that by the words " it was on the terms that the prisoner should do something with it " the learned Lord Chief Justice meant that the prisoner should fulfil his part of the bargain. This means nothing more, in effect, than that the prosecutor parted with his money on the assumption that the prisoner should act as an honest man. But this assumption that the prisoner was a bona fide bookmaker and not a welsher was a mere error *in causa*. In other words, the prosecutor was deceived by the quality of the man with whom he was dealing, who instead of being honest was dishonest. This deceit practised upon the prosecutor did nothing to invalidate the contract.[10]

The modern form of the alleged fallacy

The alleged fallacy in *Pear's* case was restated by Denning L.J. in felicitous terms in the modern case of *Pearson* v. *Rose & Young* [1951] 1 K.B. 275 at 287 as follows: —

> " If the goods are stolen from the true owner by the mercantile agent does that mean that the owner did not consent to the mercantile agent having possession of them?
>
> " At first sight the answer seems to be obvious: No man ever consents to the theft of his goods. But therein lurks a fallacy. There are many cases of larceny where the true owner consents to the thief having possession of the goods but not to his stealing them. For instance, if the true owner allows the agent to have the goods on hire or for repair, and the agent *later on* makes up his mind to steal them and does so, either by breaking bulk (common law) or by converting them to his own use (statute), the agent is guilty of larceny as a bailee; but the true owner undoubtedly consented to his having possession of them.

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[10] It should be pointed out that the case was in fact decided on the ground that the owner had parted only with the possession of the money and not with the property in it. This, however, is open to serious criticism.

This erroneous doctrine of contract was examined at length in " The Effect of a Secret Fraudulent Intent " (Hamson, 51 Law Quarterly Review 653) where the writer criticises acutely the case of *London Jewellers, Ltd.* v. *Attenborough* [1934] 2 K.B. 206. In that case the jewellers had parted with more than possession, since they had given the prisoner power to vest the property in himself, and consequently the principle in *Pear's* case had no application. The jewellers were, in fact, deceived by the quality of Waller, the prisoner, whom they thought to be an honest buyer when in fact he was a rogue.

> " Now take the same instance where the owner lets the agent have the goods on hire or for repairs, but with this difference, that the agent from the *very beginning* intended to steal the goods, then on all the authorities the agent is guilty of larceny by a trick, but the owner undoubtedly consented to his having possession of them. His state of mind is the same in both instances. He consented to the possession but not to the theft of the goods."

Now, three observations may be made upon this passage. In the first place what exactly is meant by the word " possession "? Since the owner does not consent to the theft of his goods, he clearly does not consent to a possession where the possessor is setting up a wrongful claim to complete dominion. Where, therefore, the possessor intends to exercise such a wrongful claim the consent of the owner to this state of affairs is *ipso facto* avoided. In reality then what the owner consents to is the acquisition of an innocent possession. A bailee who later on makes up his mind to convert the goods, therefore acquires an innocent possession, and the owner is bound by the consent which he has given.

Secondly, what kind of possession does a person acquire who receives the goods with an intent from the very beginning to steal them? Can he be said to be in innocent possession of the goods? In truth he is not in innocent possession at all, for in the moment of receipt he is taking full dominion, *i.e.*, precisely that to which the prosecutor does not consent. On what, then, is the consent of the prosecutor supposed to operate? Logically it has never operated at all, for the fraudulent intent at the beginning has destroyed it.

Thirdly, if, as stated, the owner does not consent to the theft of his goods, at what point in the case of larceny by a trick is the theft supposed to commence? Clearly it does not begin until possession is obtained, but if the *animus furandi* exists at the moment when possession is obtained, it must obviously begin simultaneously at that moment. How then, it may be asked, can any lawful possession vest?

With all due respect, it seems manifestly impossible to split up the entire transaction into (a) the grant of a *jus possidendi* and (b) the formation of the felonious intent, and in the case of *Lake* v. *Simmons* [1927] A.C. 487, Lord Atkinson refused to draw any such artificial distinction. He said:—

> " The operation of entrusting the possession of the jewellery but not the property in it to her [the thief] . . . was treated rather as if it were something separable from and unconnected with the theft committed. It really was nothing of the kind. The theft

> was a composite thing. It consisted, first of the false representation the woman made to the appellant, which he apparently believed, secondly the action he took, acting on that belief, and third the felonious appropriation of the goods when obtained by her to her own use. The so-called entrusting of the jewels to her furnished to her, as she intended it should, the opportunity for and the means of committing the theft."

The present dichotomy

We are now presented with the astonishing dichotomy that a person may be convicted in a criminal court of taking and carrying away the goods of an owner without his consent, and on the same facts in a civil court can be adjudged of having received possession of them with the owner's consent. This is because of the strange contention that the case of *R.* v. *Pear* is not binding on a civil court. It is said that the criminal law cannot alter the law of civil contract.

Now whatever may be the merits or demerits of the *Pear* decision, it has, in fact, been confirmed by section 1 (2) (i) (*a*) of the Larceny Act, 1916. The receipt of goods from the true owner under the circumstances laid down in *Pear's* case is a statutory trespass, and to hold otherwise is, it is submitted, to give the go-by to an Act of Parliament. It may be necessary in certain cases to subject the act of a person to delicate analysis in order to ascertain whether he has or has not consented to part with the possession of a thing, but in the case of larceny by a trick the legislature has plainly stated that he has not consented at all; the obtaining of possession in this type of larceny is as much a taking as in the other forms of larceny enumerated in the Act.

There appears to have been a remarkable unwillingness among many eminent judges to consider the Larceny Act at all in relation to this problem. There may or there may not be a fiction involved, but if there is indeed any such fiction it has been repeated in statutory form. Scrutton L.J. who, strangely enough, in *Folkes* v. *King* [1923] 1 K.B. 282 explored this problem as if the Larceny Act, 1916, was entirely irrelevant, said in the case of *Taff Vale Railway Co.* v. *Cardiff Railway Co.* [1917] 1 Ch. 299 at 317:—

> "When Kay L.J. says [11]: 'Even an Act of Parliament cannot make a freehold estate in land an easement any more than it could make two plus two equal to five':—I respectfully disagree with him and think that 'for the purposes of the Act' it can effect both these statutory results."

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[11] *Metropolitan Railway Co.* v. *Fowler* [1892] 1 Q.B. 165 at 183.

This learned Lord Justice, however, appeared to think that Parliament could not create a statutory trespass in a case where he, the learned Lord Justice, saw a *de facto* consent.

An eminent judge who did, in fact, see the absurdity of the dichotomy which the civil courts have created was the great Lord Atkin. In the later case of *Lake* v. *Simmons* [1926] 2 K.B. 51 and in a most trenchant speech he put the position thus (see p. 70): —

> "That at one and the same time she [the thief] could both take the goods without the consent of the true owner, and be entrusted with the goods by the true owner is, to my mind, a logical absurdity which I do not find it necessary to admit into our law. . . . I cannot think it arguable that in the present case a bailment was created. . . . But if she stole the goods she was from the first moment a trespasser. Larceny is a form of trespass. . . . This is not a technicality of the criminal law, but a principle as old as the common law, and governs civil rights and procedure as much as obligations and procedure in matters of crime. The truth is that the supposed consent in the physical delivery of the chattel to the thief is no consent where the circumstances constituting larceny by a trick exist and is no consent whether you view the transaction in a criminal or a civil proceeding. Exactly the same result follows in other forms of larceny though there is a delivery in fact, *e.g.*, an obtaining possession by intimidation or under a mistake by the true owner known by the thief at the time. . . . Their origin is not statute but common law. They constitute a trespass, and in my judgment regulate civil as well as criminal legislation. The only authority for introducing into our law the anomaly that a man may be at the same time a thief who has taken goods 'without the consent of the owner' and a person who is 'in possession with the consent of the true owner' is to be found in the dicta of two members of the court who decided . . . the case of *Folkes* v. *King* [1923] 1 K.B. 282 [12] . . . I think that he [the mercantile agent] takes the risk of all larceny in the taking, thereby excluding larceny by a bailee, and to hold the contrary so far from mitigating artificial distinctions is to create a new and unnecessary one, and to introduce a newfangled anomaly into the law as to consent. I may perhaps venture to add that I can see nothing artificial in the common law doctrine as to larceny by a trick, which nullifies the supposed consent in a delivery made in the relevant circumstances."

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[12] The members were Scrutton and Bankes L.J. Their views have since been adopted by Denning and Somervell L.J.

It remains to be seen whether the decision in the case of *Du Jardin* v. *Beadman Brothers, Ltd.*[13] to the effect that a factor who is guilty of larceny by a trick can nevertheless be in possession of the stolen goods with the consent of the true owner within the meaning of sections 2 (1) and 9 of the Factors Act, 1889, will be upheld by the House of Lords if and when that point comes before it for consideration.

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[13] [1952] 2 Q.B. 712.

Breach of Requirement of Probation Order

By C. W. L. JERVIS, *Solicitor*

A probationer may be in breach of his probation order either by a failure to comply with some requirement of the order or by the commission of an offence during the probation period. To some extent the former may include the latter because a probation order usually requires the probationer to be of good behaviour. The Court of Criminal Appeal appears to regard both as a breach of probation (*R.* v. *Devine* [1956] Crim.L.R. 273), but the procedure for dealing with the probationer prescribed by the Criminal Justice Act, 1948, varies according to whether there is a mere breach of the probation order (s. 6) or the commission of a further offence (s. 8). At first sight this may seem to be a duplication of the procedure, but is probably due to the fact that section 8 also covers the commission of a further offence during a period of conditional discharge, and section 6 does not. Section 6 (6) shows which section is appropriate. Where there is merely a breach of a probation order, without the commission of a further offence, the matter is entirely governed by section 6, and it is not without interest to consider the procedure with particular regard to the case of a probationer who denies the allegation. He is brought before " a court of summary jurisdiction " upon the summons or warrant issued by " a justice of the peace on whom jurisdiction is . . . conferred " by section 6, the court of summary jurisdiction being that for the petty sessional division or place for which the justice issuing the summons or warrant acts. Information has to be laid before the justice and must be in writing and on oath if a warrant is required. The information must specify the allegation " in the clearest possible terms," and must so be put to the probationer, who should be " asked to say whether he admits it or not " (*R.* v. *Devine*, *supra*). It would seem that if the probationer does not " admit it," he is virtually pleading not guilty, and the prosecution must then prove " to the satisfaction of the court " (see s. 6 (3)) that he has failed to comply with any of the requirements of the probation order. Apparently he is tried by the magistrates in like manner as if he had been charged with an offence punishable on summary conviction, but it is submitted the point is not wholly free from doubt. If the case be proved, the magistrates may, without prejudice to the probation order, " impose on him a fine not exceeding £10," or they may either sentence him for the offence in respect of which the probation order was made by a court of summary jurisdiction, or in any other case commit him in custody or on bail to the court which made the probation order. The power to fine adds colour to the view that the breach is an offence punishable on summary conviction, but some doubt is cast by section 6 (5) which provides that " a fine imposed under this section in respect of a failure to comply with the requirements of a probation order shall be deemed for the purposes of any enactment to be a sum adjudged to be paid by a conviction," a formula probably designed to facilitate the recovery of the money. Does it also give the probationer a right of appeal to quarter sessions from the decision of the court that the breach is proved to its satisfaction? The words " for the purposes of any enactment " are wide enough to import the general right of appeal, given by section 83 of the Magistrates' Courts Act, 1952. The difficulty is to decide whether the probationer is " convicted " when he is fined £10. It is considered that Parliament did not intend to give the probationer any right of appeal from a finding that he is in breach of his probation order, for the following reasons:—

(a) Section 83 (2) of the Magistrates' Courts Act, 1952, expressly gives the probationer a right of appeal to quarter sessions against a sentence for an offence in respect of which a probation order had previously been made, but is silent on the point now under discussion.

(b) The strict application of the normal procedure and consequences of summary trial would lead to absurd results. Since the finding of guilt of a breach of the order may render the probationer liable to be dealt with in any manner in which the magistrates could deal with him as if they had just convicted him of the original offence, he might claim the right of trial by jury of the alleged breach of the order, on the ground that section 25 of the Magistrates' Courts Act, 1952, is applicable (see, also, *Stone*, 1956, 88th ed., p. 58, n. (*h*)). As we shall see, such a result would give a probationer whose order was made by a court of summary jurisdiction an advantage over one whose order was made by quarter sessions or assizes.

(c) If the breach of the probation order was in itself a summary offence, the special provisions as to venue and jurisdiction enacted by section 6 (1) and (2) would be unnecessary.

(d) On committal to quarter sessions or assizes in the manner hereafter described, the probationer could plead *autrefois convict* in respect of his conviction by the magistrates.

One is driven to the conclusion that the normal procedure upon the hearing of an information leading to summary conviction is applicable to the hearing of an allegation of a breach of a probation order only so far as it is not inconsistent with the terms of section 6.

If the magistrates find the breach proved and decide to commit the probationer to the court of assize or quarter sessions which made the original order, the procedure is even more remarkable. The magistrates are required to send to the superior court a certificate of their findings (Form 66 in Appendix I of *Stone,* which refers to the probationer having been " charged " with the failure to comply) " together with such other particulars of the case as may be desirable." Such certificate " shall be admissible as evidence of the failure before the court of assize or quarter sessions." The procedure has some resemblance to the committal of a prisoner for sentence pursuant to section 29 of the Magistrates' Courts Act, 1952, with the significant difference that the court of assize or quarter sessions has to be satisfied of the failure of the probationer. The certificate of the magistrates is not expressed to be conclusive evidence of his failure, and it is clear from the dicta of the Court of Criminal Appeal in *R.* v. *Devine* (*supra*), that, if necessary, the issue is to be tried by the court " albeit without a jury." There is no bill of indictment for signature: presumably the matter is put to the probationer with the aid of the certificate of the magistrates. Neither the court of assize nor the court of quarter sessions enjoys the power of the magistrates to impose a fine without prejudice to the continuance of the probation order, although, of course, they may deal with the probationer in any manner in which they could deal with him if he had just been convicted of the offence the subject of the probation order. While it seems clear that the probationer may appeal against his sentence, he seems to have no right of appeal against the finding of the court that he was in breach of the probation order. Nor does he seem to come within any of the existing schemes of legal aid, as he is neither " committed for trial for an indictable offence " nor charged before the magistrates " with any offence " (Poor Prisoners' Defence Act, 1930, ss. 1, 2).

Practice and Procedure

Courts-Martial

The functions of the courts

In a recent case in the Courts-Martial Appeal Court, *R.* v. *Linzee and O'Driscoll,*[1] the court made the following observations: The functions of the Courts-Martial Appeal Court were: (i) to see that the verdict of the court-martial was a possible one in law; (ii) to see that there was evidence which supported the verdict; and (iii) to see that the law had been correctly laid down by the judge advocate. The summing-up was adequate if it stated fairly the facts for the prosecution and the nature and evidence of the defence. It was not the function of this court to retry the case. The position of the judge advocate was different from that of a judge and he would not, therefore, be required to address the court-martial in entirely the same way as a judge would address a jury. The judge advocate's duty was to advise the court-martial on questions of law and no complaint against the summing-up could be upheld in the present case. There was no true analogy between a court-martial and a jury or a bench of magistrates. The old common law rules relating to jury closure and jury retirement did not apply to courts-martial. Thus, the proceedings would not be nullified if the court separated. Of course, the court had to consider their verdict in private and without anybody being called in unless there were rules of procedure enabling them to do so.

[H. P.]

Coroners' Courts

Deaths of newly born children

The Home Office Circular No. 68/1955 contained the notes issued by the General Register Office to registrars on the reporting of deaths to coroners under regulations 63 and 82 of the Registration (Births, Still-births, Deaths and Marriages) Consolidated Regulations, 1954. The Home Office has now issued a Circular (No. 4/1957, dated January 1, 1957) which states that after consultation with the Coroners' Society the following has been substituted for paragraph 6 of Appendix 5:

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[1] For the appellant Linzee: *D. Lloyd, Julian Byng* (instructed by Lomer & Wheater). For the appellant O'Driscoll: *P. Lewis* (instructed by the Registrar, Courts-Martial Appeal Court). For the Crown: *E. Garth Moore* (instructed by the Director of Army Legal Services).

> "6. The death of any newly born child which is certified by a doctor as due to birth injury should be referred to the coroner, but, if such a death is certified as due to asphyxia pallida, asphyxia livida, asphyxia neonatorum, tentorial tear or intracranial haemorrhage, it is not to be regarded for that reason alone as unnatural. Such cases should be referred to the coroner only if (*a*) the coroner has requested that they should be, or (*b*) it is represented to the registrar that death resulted from accident, violence or neglect, or (*c*) that there are suspicious circumstances, or (*d*) some paragraph other than 1 (*e*) of the regulation applies."

Jurisdiction

See R. *v.* FLOWER, p. 118, below.

Summary Justice

Building

Scaffolding. Using scaffolding not of good construction, not having a working platform at least 25 inches wide on the scaffolding, and not having a suitable guard rail; fined £3 on each summons, ordered to pay 12s. 6d. costs; Sefton Building Co. Ltd.: Liverpool County Magistrates' Court (*Liverpool Echo*, December 14, 1956).

Firearms, explosives and offensive weapons

Explosives. Children, two aged 15, one 13, in unlawful possession of explosives; took home explosives from army range; first two given conditional discharge for twelve months on payment of 4s. costs; other child refused to give undertaking not to visit range again, placed on probation for two years: Folkestone Juvenile Court (*The Times*, December 12, 1956).

Food and drugs

Failing to refrain from the use of tobacco while handling open food contrary to the Food Hygiene Regulations, 1955, reg. 9; delivering unwrapped loaves, carrying them with lighted cigarette in his hand; fined £3; Taylor: St. Helens Magistrates' Court (*Liverpool Echo,* December 13, 1956).

Larceny, etc.

Larceny. Siphoning two gallons of petrol from a lorry; fined £25, with alternative of a month's imprisonment; Davis: Wimbledon Magistrates' Court (*Manchester Guardian*, December 10, 1956).

Larceny. Siphoning a gallon of petrol from a neighbour's car in a garage; fined £10; Allison: Coventry Magistrates' Court (*Liverpool Express*, December 6, 1956).

Larceny. Unscrewing draining plugs of two of his employers' lorries and taking a gallon of petrol; fined £5; Williams: Birmingham Magistrates' Court (*Birmingham Mail*, December 8, 1956).

Mines

Illegally staying down a pit. Coal filler entering part of mine other than that in which he worked and endangering lives of colliery manager and night-shift overman searching for him; fined £10, with alternative of a month's imprisonment on each of the two charges; Daley: Ashington Magistrates' Court (*Manchester Guardian*, November 30, 1956).

Road traffic

Riding a bicycle while under influence of drink; person sitting on crossbar aiding and abetting him; each fined £5; Schumacher, Lawler: Liverpool Stipendiary Magistrates' Court (*Liverpool Echo*, December 3, 1956).

Riding a bicycle while under the influence of drink; fined for similar offence four months previously; fined £10, ordered to pay two guineas costs; Pairman: West London Magistrates' Court (*The Times*, December 31, 1956).

Crossing road in contravention of a direction to stop given by a police constable contrary to section 14 (1) of the Road Traffic Act, 1956; fined 10s., magistrates taking lenient view as it was first case of its kind before them; Lovett: Norwich Magistrates' Court (*Evening Standard*, January 4).

Case and Comment*

Armed Forces—"*Service property*"—*money the property of sergeants' mess*

R. *v.* NICHOLSON [1] (Courts-Martial Appeal Court: Lord Goddard C.J., Hilbery and Slade JJ.: December 11, 1956) ([1957] 1 W.L.R. 146; [1957] 1 All E.R. 67).

N. was convicted by court-martial in Germany of five offences of fraudulently misapplying service property when concerned in the care thereof. He was sentenced to be reduced to the ranks and to undergo nine months' detention. The facts were that N., who was employed as caterer in a sergeants' mess, had fraudulently misappropriated various sums of money, the property of the mess. N. appealed to the Courts-Martial Appeal Court on the ground that the expression "service property" in section 17 of the Army Act (the section under which N. was convicted) could not apply to money which was the property of a sergeants' mess.

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* Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab), Barrister-at-Law.

[1] For the appellant: *Peter Lewis* (instructed by the Registrar, Courts-Martial Appeal Court). For the Crown: *E. Garth Moore* (instructed by the Director of Army Legal Services).

Held, dismissing the appeal, that the only question for the court was whether the term "service property" included the property of a service mess. The term "service" was defined in section 190 of the Army Act as meaning "belonging to, or connected with, Her Majesty's military forces (other than Dominion forces) or any body of Her Majesty's military forces (other than Dominion forces)." This was a pure question of law as to whether the deputy judge advocate had rightly advised the court-martial that "service property" included the property of a service mess. In the opinion of this court the court-martial had been rightly advised. The term "service property" was amply wide enough to include such property and the appeal would, therefore, be dismissed. [H. P.]

COMMENTARY. Sections 17 and 190 have been replaced by provisions in sections 44 and 225 of the Army Act, 1955, which came into operation on January 1, 1957.

Contempt—*Writ of attachment—test to be applied*

Ex p. WAIN[2] (Q.B., Divisional Court: Lynskey and Devlin JJ.: December 7, 1956) (*The Times*, December 8, 1956).

W., who was connected with a number of companies, had a warehouse which he used for the storage of oils and wares. On November 19, 1956, the police raided the warehouse and took away a quantity of goods. The following day W. was arrested on a charge of receiving linseed oil knowing it to have been stolen and was remanded on bail for a fortnight. On November 21 an article appeared in the *Daily Express* newspaper on the subject of black market oil. There was nothing in the article which named W. or referred to him directly. On an application by W. for leave to issue a writ of attachment against the editor and proprietors of the newspaper:—

Held, dismissing the application, that the test was whether the article in question was likely to prejudice W. at his trial. In the circumstances, it was impossible to say that the jury were likely to associate the article in their minds with the applicant and the application was misconceived. [J. D. P.]

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[2] For the applicant: *Glynn Blackledge Q.C., F. G. Paterson* (instructed by A. Bieber & Bieber).

COMMENTARY. Devlin J. thought prospective jurors could link up this article with the applicant only by doing "detective work." In these circumstances there was no likelihood of prejudice. Contrast *R.* v. *Astor* (1913) 30 T.L.R. 10, where the publication in a single article of two items, the one concerning a pending civil action arising out of a share transaction, the other concerning criminal proceedings arising out of the same transaction, was held to be a contempt, since the criminal jury might be prejudiced by reading of the civil action, with which they were not concerned, and connecting it with the criminal proceedings.

Corrupt Practices—*Bribery—person not doing what he was bribed to do*

R. *v.* CARR [3] (Courts-Martial Appeal Court: Lord Goddard C.J., Hilbery and Ormerod JJ.: November 29, 1956 ([1957] 1 W.L.R. 165; [1956] 3 All E.R. 979n.).

C. was convicted by court-martial of an offence under the Prevention of Corruption Act, 1906. On application to the Courts-Martial Appeal Court for leave to appeal:—

Held, dismissing the application, that C. had been charged with taking a bribe, and the learned judge advocate had directed the officers of the court-martial that they must not only be satisfied that C. had received the bribe as an inducement to show favour, but also that he had shown favour. If a person accepted a bribe and then did not do what he was bribed to do, that was no reason why he should be acquitted. Of course, in certain circumstances where a man immediately disclosed a bribe, he might not be acting improperly, but in this case it was quite a wrong direction. However, it was a direction which was in favour of the prisoner and leave to appeal would not, therefore, be granted. [H. P.]

Evidence—*Admissibility—murder—letter supplying motive*

R. *v.* ROUSE [4] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Slade JJ.: December 10, 1956) (*The Times*, December 11, 1956).

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[3] For the applicant: *D. Lloyd, Julian Byng,* (instructed by Lomer & Wheater).

[4] For the appellant: *F. D. L. McIntyre Q.C., Michael Havers, John Blofield* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Harold Brown Q.C., D. Bain* (instructed by the Director of Public Prosecutions).

R. was convicted at assizes of the murder of his wife. At the trial, the medical evidence showed that the wife had died of strangulation, but the doctor could not say whether the strangulation was manual or otherwise. The defence was that R. had been with his wife, with whom he had been on bad terms, and there was a reconciliation, but R. was not there when his wife was killed. A letter written by the wife, which stated that the wife would be seeking police protection from R., and that she would be taking proceedings for divorce, was admitted in evidence. The trial judge did not leave manslaughter to the jury. R. appealed to the Court of Criminal Appeal on the grounds (i) that the judge ought to have left manslaughter to the jury because the medical evidence showed the possibility that the wife might have died from a blow which would have reduced the crime to manslaughter; and (ii) that the letter written by the wife had been wrongly admitted in evidence.

Held, dismissing the appeal, that there was no evidence to reduce the offence to manslaughter; it was murder and, on the evidence, the jury were amply justified in finding that R. was the man who killed the woman. As to the second ground of appeal, the letter was not admitted to prove that R. had been guilty of conduct amounting to grounds for a divorce but because it showed his state of mind. The letter supplied a motive and showed that the evidence of reconciliation was not true. It was, therefore, admissible in evidence. The judge had warned the jury that the statements contained in the letter were not evidence of the truth of those matters. Accordingly, the appeal would be dismissed. [H. P.]

COMMENTARY. The letter written by the wife was inadmissible as evidence of the *truth* of any of the statements made therein because of the hearsay rule. The *fact* that the letter was written and the statements made would not be hearsay and would be admissible, if that fact were relevant, irrespective of the truth or falsity of the statements made. " Whether it is hearsay or not depends, as a rule, upon whether the *making* of the statement or its *truth* is in issue." (Harris's *Criminal Law*, 19th ed., 492.) Here the fact that the letter was written was held to be evidence of a motive.

It is surely asking a very great deal of a jury to direct them to consider a letter as evidence for one purpose and not for another. It is, nevertheless, a task which our rules of evidence commonly require juries to perform. Thus, promptly made complaints by the victims of sexual offences are admissible, not as evidence of the facts complained of, but merely as a test of the credibility of the witness.

And see the commentary on *R.* v. *Fraser* [1957] Crim.L.R. 51.

Habeas Corpus—*Order of detention on discharge from special school—release before hearing*

Ex p. WHITEHEAD[5] (Q.B., Divisional Court: Lord Goddard C.J., Hilbery and McNair JJ.: December 13, 1956) (*The Times*, December 14, 1956).

In July, 1944, an order was made under section 2 (1) (*b*) of the Mental Deficiency Act, 1913, that W., who had been in a special school for a number of years, should be sent to an institution on the ground that he was about to be discharged from the school, and it was thought that it would be to his benefit that he should be sent to an institution. An application for habeas corpus was made on his behalf on the ground that at the time when the order was made W. was not a person found neglected and, therefore, on the authority of *R.* v. *Board of Control*, *ex p. Rutty* ([1956] Crim. L.R. 331) the order was illegal. Before the hearing of the application W. was released.

Held that, in the circumstances, there was no need to issue a writ of habeas corpus, but that the applicant was entitled to his costs. [J. D. P.]

Hire-Purchase—*Initial down payments—money lent by manufacturer, paid direct to retailer*

R. *v.* LLOYDS RETAILERS LTD. AND BEETHOVEN ELECTRIC EQUIPMENT LTD.[6] (Manchester Crown Court: Jones J.: December 4 and 5, 1956).

The defendant companies were jointly charged on two counts of permitting the possession of goods contrary to article 3 of the Control of Hiring Order, 1956 (S.I. No. 179), it being alleged that they had hired a television set to each of two customers for an indeterminate period without obtaining actual payment by them respectively of the amounts required by paragraph 3 of Part II of Schedule 2 to the Order before the signing of the hiring agreements. Within a few days of February 17, 1956, when the Order was laid before Parliament, arrangements were concluded between the first defendants (retailers) and the second defendants (manufacturers) as a result of which the two customers, who were unable to find the required initial down payments, obtained these sums as interest free loans from the second defendants. The prosecution produced receipts to show that the loans were paid direct to the first defendants; the loans were for the sole purpose of crediting the customers with the advance payments. The loans were repaid by instalments collected by the first defendants as agents for the second defendants. At the close of the prosecution's case submissions upon the law were made and Jones J. ruled there was a case to go to the jury. Evidence was called by the defence to show that the book-keeping entries were not fictitious, and that moneys by way of advanced payments loaned to the customer had in fact been paid into the first defendants' normal trading account.

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[5] For the applicant: *Gavin Freeman* (instructed by Robert K. George). For the Board of Control: *Rodger Winn* (instructed by Solicitor, Ministry of Health).

[6] For the Crown: *C. T. B. Leigh* (instructed by Solicitor, Board of Trade). For the defendant companies: *F. Atkinson Q.C.*, *L. A. Cohen* (instructed by Amelan & Roth, Manchester).

Jones J. reviewed the evidence and asked the jury to decide whether it was a genuine payment or merely a device to get round the Order. The jury found the defendants Not Guilty.

[John Ward, *Barrister-at-Law.*]

COMMENTARY. See [1956] Crim.L.R. 279 for a summary of the Control of Hiring Order, 1956 (S.I. No. 179). This Order was revoked and replaced by the Control of Hiring (No. 2) Order, 1956 (S.I. No. 1269), operative from August 21, 1956. See [1956] Crim.L.R. 705 and 846.

Insanity—*Evidence—knowledge that act was wrong*

R. *v.* PUGH [7] (Liverpool Assizes: Oliver J.: October 23, 26, 1956).

P., a middle-aged man of excellent character, who had complained of long-standing interference with his radio reception caused by his next-door neighbour, went to the neighbour's house and fired eighteen shots from a revolver at random. Two shots hit the neighbour and one his wife in the lower part of the body. P. told a constable afterwards he had "acted under great provocation." The prisoner was indicted on two charges of shooting with intent to murder, on two further charges of wounding with intent to murder, and on two charges of wounding with intent to cause grievous bodily harm. On the direction of the judge, the jury returned a verdict of Not Guilty on the first four charges. When the prisoner was in the witness-box, Oliver J. asked him: "Did you know that you were doing these things, and that they were against the law?" He said: "Of course I knew it was against the law: that is, if I had thought I would have known." The prison medical officer said the prisoner was definitely a paranoic and he would call him certifiable as a lunatic, but that he clearly knew what he was doing at the particular time. When asked by the judge whether P. knew that what he was doing was wrong, he said: "I think he would be unable to direct his mind as to whether what he was doing was right or wrong." Reminded that did not answer the question, the doctor said: "I cannot directly answer that question." A psychiatrist, who also thought the prisoner a paranoic, went further than the doctor. He said: "He would know to some extent what he was doing but not fully," and "I do not think that he would know that what he was doing was wrong in the sense that it was forbidden by law." He agreed with the judge that the use of the words: "I acted under great provocation" did seem to show that he knew what he was doing was wrong, but added: "I think I know better than he does himself as to whether or not he knows he was doing wrong."

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[7] For the Crown: *E. Steele* (instructed by Town Clerk, Liverpool). For the defendant: *J. S. Watson Q.C., J. M. Dovener* (instructed by K. Maxwell Brown, Liverpool).

Oliver J. directed the jury that the issue of insanity being one for the jury, they were entitled, if they thought fit, to prefer the prisoner's own testimony, as to the state of his mind, to the medical evidence. The prisoner was found Guilty.

[K. B. Edwards, *Barrister-at-Law*.]

COMMENTARY. It is well established that the defence of insanity is not available to a man who knows the nature and quality of his act, and that it is against the law: *R.* v. *Windle* [1952] 2 Q.B. 826. It is for the jury, and not for medical men of whatever eminence, to determine the issue; and where a jury returns a verdict of Guilty contrary to the medical evidence the Court of Criminal Appeal will set it aside only if satisfied that no reasonable jury could have returned such a verdict in the particular case: *R.* v. *Rivett* (1950) 34 Cr.App.R. 87.

Jurisdiction—*Place of trial.* See R. *v.* FLOWER, p. 118, below.

Jurisdiction—*Quarter Sessions—charge of dangerous driving—indictment for manslaughter*

Re SHIPTON [8] (Q.B., Divisional Court: Lord Goddard C.J., Hilbery and Ormerod JJ.: December 17, 1956) (*The Times*, December 18, 1956).

On October 12, 1956, S. was charged at Dorchester Assizes on an indictment containing a single count of manslaughter in connection with the use of a motor-car. The jury returned a verdict of Not Guilty of manslaughter, and said that they were not agreed whether S. was guilty of dangerous driving. The judge discharged the jury and directed the issue of dangerous driving to be tried at Bournemouth Quarter Sessions. He refused an application to prefer a voluntary bill of indictment charging S. with dangerous driving. At quarter sessions the recorder took the view that he had no jurisdiction to try S. because the only indictment before him was for manslaughter. On an *ex parte* application by the Director of Public Prosecutions for leave to move for an order of mandamus directing the recorder to try S. on the dangerous driving issue:—

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[8] For the applicant: *Sir Harry Hylton-Foster Q.C., S.-G., Rodger Winn* (instructed by the Director of Public Prosecutions).

Held that, the only count being one of manslaughter, and the jury having returned a verdict on that count, the recorder had no jurisdiction to try S. for dangerous driving and the application would be refused.

Quaere, whether, if a voluntary bill had been preferred, S. could have successfully pleaded *autrefois acquit*. [J. D. P.]

COMMENTARY. Under the Criminal Justice Act, 1925, s. 14 (2), where a trial at assizes or quarter sessions is either not proceeded with or not brought to a final conclusion, the court has power to direct that the trial shall take place at assizes or quarter sessions for some other place. The judge apparently treated this case as a trial not brought to a final conclusion.

Quarter sessions has no jurisdiction to try an indictment for manslaughter, but it has jurisdiction to try dangerous driving. Where a person is indicted for manslaughter the jury may, under the Road Traffic Act, 1934, s. 34, find him guilty of dangerous driving on the same indictment.

The defence of *autrefois acquit* applies not only to the offence actually charged in the indictment but also to any other offence of which the accused could properly have been convicted on that indictment. If the jury at Dorchester Assizes had returned a simple and unqualified verdict of Not Guilty it is plain that Shipton could not in any circumstances have been tried thereafter for dangerous driving. Since the jury had expressly said that they were not agreed on the issue of dangerous driving it may be that an indictment actually charging that crime would lie. The court does not seem to have decided the point; but the Solicitor-General pointed out that it would have been difficult for the defendant to point to a verdict which disposed of the matter in respect of which he was in jeopardy; and the Lord Chief Justice said it was a pity that the judge had not given leave to the prosecution to prefer a voluntary bill of indictment for dangerous driving.

Jury—*Indictment given to jury—previous convictions on back of indictment*

R. *v.* FLOWER [9] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Slade JJ.: December 10, 1956) (*The Times*, December 11, 1956).

F. was convicted at Buckinghamshire Quarter Sessions of taking and driving away a motor-car without the consent of the owner, and was sentenced to eight months' imprisonment. F. was acquitted on two other counts, one of breaking and entering a garage and stealing the motor-car, and the other of receiving the motor-car knowing it to have been stolen. F. had previous convictions and the convictions making him eligible for corrective training appeared on the back of the indictment. When the jury retired they were given the indictment. On appeal to the Court of Criminal Appeal:—

Held, allowing the appeal, that this court could not say that the jury had not seen the convictions on the back of the indictment and R. was entitled to say that the position was the same as if he had been cross-examined about his previous convictions. Although this court was quite sure there was no miscarriage of justice, the jury had improper information and the conviction would have to be quashed. A further point was that the offence of taking and driving away the car was alleged to have been committed in Buckinghamshire, where the case had been tried. The defence at the trial had been that F. had taken the car at Southend. If that were so, F. could not have been tried in Buckinghamshire without the necessary formalities and the jury should have been directed that they should not convict if they thought F. had taken the car at Southend. It might be that F. was still liable to be charged at Southend as he would probably not be able to plead *autrefois acquit*.

Per Lord Goddard C.J.: The jury probably acquitted F. of breaking and entering and stealing in the present case because they were not satisfied that he had the intention to steal the motor-car as opposed merely to taking it without consent. He (his Lordship) had often wondered why, since the statutory offence of taking and driving away without consent was created, the former offence of stealing the petrol was not made use of. If, in the present case, the charge had been stealing petrol there would have been no difficulty. His Lordship hoped that the police would remember that that charge was still available. [H. P.]

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[9] For the appellant: *Julian Byng* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. C. Lawrence* (instructed by Harris & Cartwright, Slough).

COMMENTARY. The court laid down in *R.* v. *Dickson* [1950] 1 K.B. 394 that the judge's attention should be directed to the previous convictions either by an averment in the indictment or by attaching the notice served on the prisoner to the indictment. The jury, however, should not know of the prisoner's convictions until after they have returned their verdict.

Under section 28 of the Road Traffic Act, 1930, taking a motor-vehicle without the owner's consent is an offence punishable on indictment with twelve months' imprisonment. Corrective training and preventive detention can be imposed only where the offence is punishable with imprisonment for a term of two years or more. Stealing petrol is, of course, simple larceny and punishable with five years' imprisonment.

A person should normally be tried in the county in which he committed the offence. Under the Criminal Justice Act, 1925, s. 11, he may be tried in any county or place in which he was apprehended, or is in custody, or has appeared in answer to a summons, but magistrates may not commit for trial under this section where to do so would cause hardship to the accused: Magistrates' Courts Act, 1952, s. 9 (2).

The defence of *autrefois acquit* has no application where the prisoner was not liable lawfully to suffer judgment on the first trial because the court lacked jurisdiction.

Larceny—*Petrol.* See R. *v.* FLOWER, p. 118, above.

Murder—*Evidence.* See R. *v.* ROUSE, p. 112, above.

Police—*Wages paid to injured policeman—recovery from corporation liable for injury*

METROPOLITAN POLICE DISTRICT RECEIVER *v.* CROYDON CORPORATION; MONMOUTHSHIRE COUNTY COUNCIL *v.* SMITH[10] (Court of Appeal: Lord Goddard C.J., Morris L.J. and Vaisey J.: December 4, 1956) ([1957] 2 W.L.R. 33; [1957] 1 All E.R. 78).

Appeals were made against two conflicting decisions of Slade J. and Lynskey J. ([1956] Crim.L.R. 567, 631). In the first case a police constable had been injured as the result of the negligence of one of the corporation's servants, in the second as a result of the negligence of the defendant. The Receiver claimed the amount of wages paid to the constable during his incapacity, the County

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[10] For the receiver: *Gerald Gardiner Q.C., Patrick O'Connor* (instructed by Ponsford & Devenish, Tivendale & Munday). For the corporation: *Gilbert Paull Q.C., Montague Berryman Q.C., Humfrey Edmunds* (instructed by Herbert Smith & Co.). For the county council: *Gerald Gardiner Q.C., R. C. Hutton* (instructed by Vernon Lawrence, Newport, Mon.). For the defendant: *R. G. Micklethwait Q.C., C. N. Pitchford* (instructed by Myer Cohen & Co., Cardiff).

Council such wages and further sums paid to the injured policeman, who later retired from the force on a pension.

Held, reversing [1956] Crim.L.R. 567, and affirming [1956] Crim. L.R. 631, that as the plaintiffs were obliged to pay the police constables while they were incapable of performing their duties, no matter what the cause of their incapacity was, they were no worse off than if the accident had never happened. The only loss which the plaintiffs had suffered was that they had had to pay the policemen while they were receiving no services from them, but no action lay in respect of the loss of services of a policeman because he was a servant of the Crown; accordingly, the plaintiff's claim in each case failed. [J. D. P.]

COMMENTARY. It was established by the decision of the Privy Council in *Att.-Gen. for New South Wales* v. *Perpetual Trustee Co.* [1955] Crim. L.R. 381 that a police authority cannot recover in an action *per quod servitium amisit* in respect of the loss of the services of a police constable because the constable is the holder of a public office, and his relationship with the police authority which pays him is not that of master and servant. If the injured policemen in the present cases had lost their wages as the result of the accidents, the damages which they recovered from the defendants would have been increased by the amount of the wages. It was, therefore, argued that the defendants had been unjustly enriched as a result of the plaintiffs having paid the wages, and that the plaintiffs should be able to recover in quasi-contract. The view of the court was that the defendants were not unjustly enriched because they had paid all the damages they were liable in law to pay.

An ordinary employer who, by his contract, had to pay his servant wages during the servant's absence from work as a result of injuries caused by the defendant would, it seems, similarly be unable to recover in an action based on quasi-contract; but the ordinary employer might succeed in the action *per quod servitium amisit* which is not open to a police authority in respect of a constable's services.

On the important practical consequences of this decision, see [1956] Crim.L.R. 568.

Quarter Sessions—*Jurisdiction to try case sent from assizes.* See *Re* SHIPTON, p. 116, above.

Acts and Orders*

Aliens

Continuance of offences: p. 122, below.

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* Prepared by F. Maurice Drake, Esq., Barrister-at-Law.

Armed Forces

IMPRISONMENT AND DETENTION RULES, 1956, ARMY (S.I. No. 1914); AIR FORCE (S.I. No. 1981): both operative January 1, 1957. These Rules replace without substantial changes the Rules for Military Detention Barracks and Military Prisons, 1947 (S.I. No. 1744), the Rules for the Management of Barrack Detention Rooms, 1951, and the Rules for the Management of Service Detention Rooms for Airmen and Airwomen, which Rules ceased to have effect on the coming into operation of the Army Act, 1955, and the Air Force Act, 1955.

FEES FOR CERTIFICATES OF ARREST AND SURRENDER OF DESERTERS AND ABSENTEES REGULATIONS, 1956: ARMY (S.I. No. 2019); AIR FORCE (S.I. No. 2051): both operative January 1, 1957. Fees are prescribed which are payable to clerks of courts of summary jurisdiction for certificates furnished in accordance with the Certificates of Arrest and Surrender of Deserters and Absentees Regulations, 1956 (S.I. Nos. 580, 657; [1956] Crim.L.R. 429, 498).

EXECUTION OF SENTENCES OF DEATH (AIR FORCE) REGULATIONS, 1956 (S.I. No. 2054): operative January 1, 1957. Regulations are made with respect to the execution of sentences of death passed by courts-martial under the power conferred by sections 121, 123 and 126 of the Air Force Act, 1955. The regulations deal, *inter alia,* with the custody of persons under sentence, the arrangements for and methods of carrying out sentences of death, the treatment of condemned persons and their burial.

Borstal

BORSTAL RULES, 1956 (S.I. No. 1987): operative January 12, 1957. The Borstal Rules, 1949 (S.I. 1949, No. 1283), as amended, are further amended as regards temporary release, delegation of the Governor's duties and investigation of offences by the Governor.

British Commonwealth

SIERRA LEONE (HOUSE OF REPRESENTATIVES) ORDER IN COUNCIL, 1956 (S.I. No. 1893): operative on a day to be appointed by the Governor by proclamation in the *Gazette*. A House of Representatives is established for Sierra Leone in place of the previously existing Legislative Council; it consists of a Speaker, four *ex officio* members, fifty-one elected and two nominated members. By section 39 any person who sits or votes in the House knowing or having reasonable ground for knowing that he is not qualified to do so, is liable to a penalty not exceeding £20 for each day on which he so sits or votes. The penalty is recoverable only at the suit of the Attorney-General.

BAHRAIN (REMOVAL OF PRISONERS) ORDER, 1956 (S.I. No. 2031): operative December 19, 1956. The Colonial Prisoners Removal Act, 1869, is extended to Bahrain.

PRISONERS REMOVAL (BAHRAIN AND ST. HELENA) ORDER, 1956 (S.I. No. 2032): operative December 19, 1956. The making of arrangements for the removal of prisoners (not being persons subject to the Bahrain Order, 1952, as from time to time amended) from Bahrain to St. Helena, and for their return, is sanctioned.

Emergency Laws: see p. 124, below.

Civil Aviation

AIR NAVIGATION (RADIO) (AMENDMENT) REGULATIONS, 1956 (S.I. No. 1845): operative January 1, 1957. The principal Regulations (S.I. 1954, No. 900; [1954] Crim.L.R. 726) are corrected in minor details, and are amended by excepting public transport aircraft used in that capacity for training purposes only from certain requirements of the principal Regulations dealing with the maintenance of radio apparatus and the issue of certificates of serviceability in respect thereof. Aircraft flying to, from or over Berlin are required to be equipped with specified radio navigation apparatus appropriate to the route.

For penalties for contraventions see article 67 of the Air Navigation Order, 1954 (S.I. No. 829).

Continuance of Offences

EXPIRING LAWS CONTINUANCE ACT, 1956 (5 Eliz. 2, c. 4): operative December 20, 1956. The following provisions, *inter alia*, are continued in force until December 31, 1957: Aliens Restriction (Amendment) Act, 1919, s. 1 (continuance of emergency powers under Aliens Restriction Act, 1914, s. 1 (1)); Population (Statistics) Act, 1938; Education (Exemptions) (Scotland) Act, 1947. The following provisions are continued until March 31, 1958: Rent of Furnished Houses Control (Scotland) Act, 1943; Furnished Houses (Rent Control) Act, 1946.

The Road Traffic Act, 1934, s. 1, which relates to the general speed limit of 30 m.p h. in built-up areas has been made permanent by the Road Traffic Act, 1956, s. 4 (1).

Copyright

COPYRIGHT ACT, 1956 (4 & 5 Eliz. 2, c. 74): operative on a day to be appointed by the Board of Trade. Various dealings which infringe copyright are offences under this Act where the person responsible has knowledge of the infringement. It is an offence knowingly to infringe copyright by making or selling or letting or exposing for sale or hire or publicly exhibiting or importing into the United Kingdom other than for private use any article (s. 21 (1)); it is a further offence to distribute for trade or other purposes articles which a person knows to be infringing copies of a work in which copyright subsists (s. 21 (3)); or to possess any plate knowing that it is to be used for making infringing copies of such a work (s. 21 (3)). Under section 21 (5) it is an offence to cause any literary, dramatic or musical work to be performed in public, knowing that the performance constitutes an infringement of copyright.

For penalties for contraventions see section 21 of the Act.

Customs and Excise

EXPORT OF GOODS (CONTROL) (AMENDMENT) ORDER, 1956 (S.I. No. 1960): operative December 13, 1956. The Export of Goods (Control) (Consolidation) Order, 1956 (S.I. No. 1702; [1957] Crim. L.R. 64) is amended. The export of airframe and aero engine parts, spares and components is prohibited, except under licence, to Israel, Saudi Arabia, Syria and Yemen, in addition to Egypt.

For penalties for contraventions see section 3 of the Import, Export and Customs Powers (Defence) Act, 1939.

Defence Regulations

EMERGENCY LAWS (CONTINUANCE) ORDER, 1956 (S.I. No. 1883): operative November 29, 1956. The following enactments and Defence Regulations are continued in force for a further year, until December 10, 1957: Emergency Laws (Transitional Provisions) Act, 1946, s. 3 (1) (wheat and land drainage); the Defence (General) Regulations, regulations 52 (use of land for purposes of H.M. Forces); 83 and 85 (obstruction, entry upon, and inspection of, land); 92, 93, 98, 99B, 100, 101, 102, 105 (legal and supplementary provisions); Parts I, II, III, IX, and Schedules I and II of the Defence (Agriculture and Fisheries) Regulations, 1939; regulations 1 and 6 of the Defence (Armed Forces) Regulations, 1939; and regulations 1 and 3 (5) of the Defence (Patents, Trade Marks, etc.) Regulations, 1941.

DEFENCE REGULATIONS (NO. 4) ORDER, 1956 (S.I. No. 1884): operative January 1, 1957. The following regulations of the Defence (General) Regulations, 1939, are revoked or partially revoked and amended: regulation 51A (power to work minerals, and provisions for compensation in respect of requisition of plant used in connection with a mine or quarry); regulation 59 (2) (3) (exemptions from the Coal Mines Act, 1911, the Metalliferous Mines Regulation Acts, 1872 and 1875, and the Quarries Act, 1894); regulation 60A (powers to make provision for securing the safety, health, and welfare of persons engaged in mining or quarrying operations); regulation 85 (1) (*c*) (entry upon and inspection of land).

DEFENCE REGULATIONS (NO. 5) ORDER, 1956 (S.I. No. 1885): operative December 6, 1956. Regulations 55, 55AA and 55AB of the Defence (General) Regulations, 1939, are amended, and power is given to regulate various activities concerning oil produced from coal, shale or peat, crude benzole, benzene, solvent naphtha, coal-tar, coal-tar distillates, and various similar substances. Power is also given to require undertakings concerned with these substances to keep books and furnish information and to authorise the inspection of such undertakings. Provision is also made for price control to be imposed on any of those substances. See also the similar order, relating to petroleum and petroleum products (S.I. No. 1693; [1956] Crim.L.R. 846).

DEFENCE REGULATIONS (NO. 6) ORDER, 1956 (S.I. No. 1886): operative January 1, 1957. Regulation 55 of the Defence (General) Regulations, 1939, is amended, and the powers to regulate or prohibit the production of certain articles cease to be exercisable in relation to paper, tinplate, terneplate and blackplate, except that in connection with defence matters the power is retained to control the re-export from, and movement, disposal and acquisition of such articles outside the United Kingdom.

See also Emergency Laws.

EMERGENCY LAWS (MISCELLANEOUS PROVISIONS) (COLONIES, ETC.) ORDER IN COUNCIL, 1956 (S.I. No. 1887): operative November 29, 1956. The Governors of the Bahamas, Cyprus, Jamaica, Kenya, Leeward Islands, and Trinidad and Tobago, may by order provide for the continuation in force of Defence Regulations in their territories.

Emergency Laws

PAPER (MISCELLANEOUS CONTROLS) (REVOCATION) ORDER, 1956 (S.I. No. 1915): operative December 9, 1956. Previous Orders relating to the control of paper (S.I. 1940, No. 1996, and S.I. 1942, No. 1965), the control of printing and exhibition of contents posters (S.I. 1950, No. 1088), the control of the size of newspapers (S.I. 1953, No. 30, and S.I. 1956, No. 1233), and the amendment of those controls (S.I. 1954, No. 1694) are all revoked.

IRON AND STEEL DISTRIBUTION (REVOCATION) ORDER, 1956 (S.I. No. 2028): operative December 31, 1956. Regulations concerning the control of tinplate, terneplate and blackplate are revoked.

See also Defence Regulations.

MOTOR FUEL (NO. 3) ORDER, 1956 (S.I. No. 1974): operative December 17, 1956. The operative date is the day prescribed for the provisions of the Motor Fuel (No. 2) Order, 1956 (S.I. No. 1742; [1957] Crim.L.R. 64) to come into operation. The quantities of motor fuel per unit and the periods during which coupons are valid are also prescribed.

For penalties for contraventions see section 3 of the Import, Export and Customs Powers (Defence) Act, 1939.

Employment

ELECTRICITY SUPPLY (HOURS, SAFETY AND WELFARE) (REVOCATION) ORDER, 1956 (S.I. No. 1958): operative December 31, 1956. The principal Order (S.I. 1943, No. 187), which enabled women to be employed in electrical stations in accordance with certain schemes of hours outside those permitted under Part VI of the Factories Act, 1937, is revoked.

SUNDAY BAKING AND SAUSAGE MAKING (CHRISTMAS AND NEW YEAR) ORDER, 1956 (S.I. No. 1906): operative December 23, 1956. The prohibition of Sunday employment laid down in section 77 of the Factories Act, 1937, did not apply to women employed in factories in the manufacture of bread or flour, confectionery (including meat and fruit pies but not biscuits) or sausages on Sunday, December 23, 1956, in Great Britain, and also on Sunday, December 30, in Scotland.

Food and Drugs

MILK (AMENDMENT NO. 2) ORDER, 1956: GREAT BRITAIN (S.I. No. 1989); NORTHERN IRELAND (S.I. No. 1990): both operative

January 1, 1957. The maximum price of milk on sale in Great Britain and Northern Ireland is increased by ½d. per pint from January 1, 1957. In Scotland an additional ½d. per pint may be charged for the sale of Channel Islands milk.

For penalties for contraventions see regulation 92 of the Defence (General) Regulations, 1939.

FOOD HYGIENE (AMENDMENT NO. 2) REGULATIONS, 1956 (S.I. No. 1984): operative December 31, 1956. In relation to shrimps, prawns and onions the date of coming into operation of regulation 7 of the Regulations of 1955 (S.I. No. 1906; [1956] Crim.L.R. 133), is postponed to January 1, 1958. This regulation restricts the giving out of food for preparation or packing on or about domestic premises for the purposes of a food business, and came into operation in relation to all other food on July 1, 1956.

For penalties for contraventions see regulation 33 of the principal Regulations.

Hire-Purchase

CONTROL OF HIRING (VEHICLES) (REVOCATION) ORDER, 1956 (S.I. No. 2056): operative December 21, 1956. The principal Order (1956, S.I. No. 1499; [1956] Crim.L.R. 846) is revoked.

HIRE-PURCHASE AND CREDIT SALE AGREEMENTS (CONTROL) (AMENDMENT NO. 2) ORDER, 1956 (S.I. No. 2055): operative December 21, 1956. The principal Order (S.I. No. 180; [1956] Crim.L.R. 279) is further amended by reducing the minimum deposit required for certain vehicles, and for the auxiliary units specified in item 21 of the First Schedule to the principal Order, from 50 per cent. to 20 per cent.

For penalties for contraventions see regulation 92 of the Defence (General) Regulations, 1939.

Housing

Continuance of offences: see p. 122, above.

London

The following Orders have been made detailing prescribed routes: S.I. 1956, Nos. 1848 (Wood Green and Hornsey); 1933 (Dartford); 1963 (Hammersmith); 2002 (Finchley); 2003 (Surbiton and Kingston-upon-Thames); 2004 (St. Pancras).

The following Order has been made prohibiting waiting: S.I. 1956, No. 1934 (Dartford).

LONDON CAB ORDER, 1956 (S.I. No. 1988): operative December 21, 1956. Provided that a notice in the terms specified in the Schedule is prominently displayed in the cab throughout a hiring, a surcharge of sixpence will be payable for the hiring in addition to the sum recorded on the taximeter.

Metropolitan police: see p. 129, below.

Magistrates' Courts

Fees: see p. 121, above.

Merchant Shipping

MERCHANT SHIPPING (CERTIFICATES OF COMPETENCY AS A.B.) (NEW ZEALAND) ORDER, 1956 (S.I. No. 1895): operative December 12, 1956. Certificates of competency as A.B. granted in New Zealand are to have the same effect as if granted directly under the provision of section 5 of the Merchant Shipping Act, 1948, or of the regulation made under that section. Section 104 of the Merchant Shipping Act, 1894 (which relates to forgery and other offences relating to certificates of competency of ships' officers granted under that Act), shall apply to New Zealand certificates of competency as A.B.

For penalties for contravention of section 104 of the Merchant Shipping Act, 1894, see section 680 of that Act.

MERCHANT SHIPPING (SAFETY CONVENTION COUNTRIES) (VARIOUS) (NO. 3) ORDER, 1956 (S.I. No. 2040): operative January 1, 1957. Argentina and Bulgaria have accepted the Safety Convention of 1948.

Mines and Quarries

The following Orders have been made under the provisions of section 190 (1) of the Mines and Quarries Act, 1954. They are all operative on January 1, 1957, and re-enact, with modifications, provisions of existing enactments and regulations which will otherwise cease to have effect on that date. S.I. Nos. 1758–1777 inclusive, 1782 and 1783 are applicable to mines of coal, stratified ironstone, shale and fireclay. S.I. Nos. 1758 (managers and officials); 1759 (mechanics and electricians); 1760 (surveyors and plans); 1761 (general duties and conduct of persons employed and other persons to preserve safe working); 1762 (shafts, outlets and roads); 1763 (support); 1764 (ventilation); 1765 (safety-lamps and lighting); 1766 (electricity); 1767 (explosives); 1768 (fire and rescue); 1769 (precautions against inflammable dust);

1770 (precautions against inrushes); 1771 (locomotives); 1772 (steam boilers); 1773 (sidings); 1774 (first aid); 1775 (medical examinations); 1776 (sanitary conveniences); 1777 (horses); 1782 (rules governing plans of workings); 1783 (rules governing abandonment plans).

S.I. Nos. 1778 (miscellaneous provisions similar to those referred to above) and 1779 (electricity) are applicable to miscellaneous mines other than mines of coal, stratified ironstone, shale and fireclay. S.I. Nos. 1780 (general similar provisions) and 1781 (electricity) are applicable to quarries. S.I. No. 1942 (preparation and use of cardox and hydrox shells) is applicable only to coal mines. S.I. No. 1943 (explosives and shot-firing) is applicable to mines of stratified ironstone, shale and fireclay. S.I. No. 2017 (training of persons for employment in coal mines). S.I. No. 2016 (manner of search for smoking materials in any mines).

For penalties for contraventions see sections 155, 160, 161 and 162 of the Mines and Quarries Act, 1954 ([1955] Crim.L.R. 126).

MINES AND QUARRIES (REFERENCE) RULES, 1956 (S.I. No. 1784): operative January 1, 1957, regulate the procedure to be followed, and specify the powers of the referee, when reference to a referee is demanded by the owner or manager of a mine or quarry upon whom an inspector has served a notice under any provision of the Act or regulations.

For penalties for contraventions see sections 155, 160, 161 and 162 of the Mines and Quarries Act, 1954 ([1955] Crim.L.R. 126).

COAL AND OTHER MINES REGULATIONS, 1956, HEIGHT OF TRAVELLING ROADS (S.I. No. 1940); TRANSPORT ROADS (S.I. No. 1941): both operative January 1, 1957. Certain lengths of road in mines of coal, stratified ironstone, shale and fireclay are exempted from the provisions of section 35 (1) (height and width of travelling roads) and section 39 (1) (*b*) (safety of foot-passengers in transport roads) of the Mines and Quarries Act, 1954.

Defence Regulations: see p. 124, above.

Morocco

MOROCCO (FORMER SPANISH ZONE) ORDER, 1956 (S.I. No. 1896): operative December 6, 1956. Effect is given to a Declaration made on November 22, 1956, by H.M. Government in the United Kingdom, whereby a renunciation was made, as from December 6, 1956, of the jurisdiction possessed by Her Majesty in the former Spanish

Zone of Morocco. It contains safeguards with regard to the continuance of cases regularly instituted before the Court for Morocco prior to December 6, 1956.

Northern Ireland

Milk: see p. 125, above.

Pest Control

IMPORTATION OF CARNATION CUTTINGS (SCOTLAND) ORDER, 1956 (S.I. No. 1924): operative December 11, 1956. In addition to requirements imposed by the Importation of Plants (Scotland) Order, 1955 (S.I. No. 405; [1955] Crim.L.R. 327) cuttings of carnation plants may not be imported into Scotland unless the plants from which such cuttings were taken and the plants from which such plants were derived were tested and found free from bacterial wilts or unless these diseases are not known to be established in the country of origin.

For penalties for contraventions see section 1 of the Destructive Insects Act, 1877.

Police

POLICE, FIRE AND PROBATION OFFICERS REMUNERATION ACT, 1956 (5 Eliz. 2, c. 1): operative November 28, 1956. The Secretary of State is empowered to make increases of pay to members of police forces and to probation officers, with retrospective effect from September 8, 1955. The Act extends to Scotland as well as England and Wales, but not to Northern Ireland.

POLICE (NO. 3) REGULATIONS, 1956 (S.I. No. 1944); SCOTLAND (S.I. No. 1983): both operative December 5, 1956. The increases in pay and allowances granted to certain members of police forces as from December 16, 1955, by the Police (No. 2) Regulations, 1955 (S.I. Nos. 1913, 2003; [1956] Crim.L.R. 136, 138), are made retrospective to September 8, 1955.

METROPOLITAN POLICE STAFFS (INCREASE OF SUPERANNUATION ALLOWANCES) ORDER, 1956 (S.I. No. 1901): operative November 28, 1956, and taking effect from April 1, 1956. Pensions payable to or in respect of retired members of the civil staffs employed under the Commissioner of Police of the Metropolis or the Receiver of the Metropolitan Police District and retired members of the staffs of the Metropolitan Magistrates' Courts may be increased in a similar manner to those payable to or in respect of persons formerly in the Civil Service. The Metropolitan Police Staffs (Increase of

Superannuation Allowances) Orders of 1944 (S.I. No. 970) and 1952 (S.I. No. 2181) are revoked.

POLICE (SCOTLAND) ACT, 1956 (COMMENCEMENT) ORDER, 1956 (S.I. No. 1995): operative December 21, 1956. The Police (Scotland) Act, 1956 (4 & 5 Eliz. 2, c. 26; [1956] Crim.L.R. 357) was brought into operation on January 1, 1957.

POLICE (LOCAL ENACTMENTS) (SCOTLAND) ORDER, 1956 (S.I. No. 1996): operative January 1, 1957. Notwithstanding the general repeal of various provisions by the Police (Scotland) Act, 1956, the local provisions set out in the Schedule to the Order will continue to have effect. The scheduled provisions deal with (a) the appointment of special constables in Aberdeen; (b) rewards to constables and others in Edinburgh; (c) the appointment in Glasgow of officers known as the Custodier and the Registrar; and (d) arrangements relating to the policing of the port and harbour of Greenock.

POLICE (SPECIAL CONSTABLES) (SCOTLAND) REGULATIONS, 1956 (S.I. No. 1997): operative January 1, 1957. The Special Constables (Scotland) Orders, 1923, 1940 and 1948 (S.I. 1923 No. 1232; 1940 No. 858; 1948 No. 1326), are consolidated, with amendments, into a single code. The principal amendments are that the ranks which may be held by special constables are prescribed in Regulation 1; and a height qualification (five feet six inches) is prescribed in Regulation 2 (c).

POLICE (DISCIPLINE) (SCOTLAND) REGULATIONS, 1956 (S.I. No. 1998): operative January 1, 1957. The Regulations of 1952 (S.I. No. 1356) are amended to make specific provision for the hearing of a discipline charge by someone other than the chief constable, when the chief constable is a material witness or is interested otherwise than in his capacity as chief constable.

POLICE (SCOTLAND) REGULATIONS, 1956 (S.I. No. 1999): operative January 1, 1957. Numerous regulations made under the Police Act, 1919, are revoked and re-enacted with certain amendments. The principal changes are as follows: Regulation 8 prescribes the form of declaration to be made by persons appointed to the office of constable of a police force; this takes the place of the form of oath or declaration prescribed in previous Acts. Regulation 19 makes provision as to the voluntary resignation of members of police forces. Regulation 27 makes provision for the granting of a weekly rest day to members of police forces not above the rank of chief inspector; this replaces similar provisions in a previous Act.

Prisons

PRISON RULES, 1956 (S.I. No. 1986): operative January 12, 1957. The Prison Rules, 1949 (S.I. 1949, No. 1073), as amended by the Prison Rules, 1952 (S.I. 1952, No. 1405), are further amended in relation to reporting of disciplinary offences to and investigation by the Governor (r. 43); reference of certain specified reported offences to the Visiting Committee (r. 44); duty of Chairman of Visiting Committee upon reference of certain specified reported offences (r. 45); release on parole (r. 84A); reduction of daily period of open air exercise, in special circumstances (r. 97 (1)).

In addition to these amendments the penal grade for prisoners serving sentences of preventive detention is abolished, and in consequence rule 170 is revoked, and rules 163 and 169 (1) are amended.

Public Health

CLEAN AIR ACT, 1956 (APPOINTED DAY) ORDER, 1956 (S.I. No. 2022); SCOTLAND (S.I. No. 2026): both operative December 31, 1956. These Orders bring into operation on December 31, 1956, the provisions of the Clean Air Act, 1956 ([1956] Crim.L.R. 645), other than the following provisions: ss. 1 and 2 (emission of dark smoke from chimneys), ss. 5 to 9 (emission of grit and dust from non-domestic furnaces), s. 16 (penalties for certain contraventions), ss. 19 and 20 (railway engines and vessels), s. 22 (1) (*a*) (*c*) (*d*) (Crown premises, reporting of nuisances), (ships of or employed by H.M. Navy), s. 22 (3) (vessels owned by the Crown), s. 35 (1) and (2) (repeals and transitional provisions), Sched. 4 (repeals).

SMOKE CONTROL AREAS (AUTHORISED FUELS) REGULATIONS, 1956 (S.I. No. 2023); SCOTLAND (S.I. No. 2027): both operative December 31, 1956. Anthracite, briquetted fuels carbonised in the process of manufacture, coke, electricity, gas, low temperature carbonisation fuels and low volatile steam coals are declared to be authorised fuels for the purposes of section 11 of the Clean Air Act, 1956 ([1956] Crim.L.R. 645).

For penalties for contraventions, see section 27 (2) of the Clean Air Act, 1956.

Revenue

EXCHANGE CONTROL (SPECIFIED CURRENCY) ORDER, 1956 (S.I. No. 2088): operative January 2, 1957. The foreign currencies which must be offered for sale to an authorised dealer are specified. Austrian schillings have now been added to the scheduled foreign currencies.

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

EXCHANGE CONTROL (PAYMENTS) (AUSTRIA) ORDER, 1956 (S.I. No. 2087): operative January 2, 1957. The Exchange Control (Payments) Order, 1954 (S.I. No. 325), is further amended by extending the prescribed manner of payment for exports from the United Kingdom to Austria.

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

Road Traffic

ROAD TRAFFIC ACT, 1956 (COMMENCEMENT NO. 2) ORDER, 1956 (S.I. No. 1937): operative December 5, 1956. The following provisions of the Road Traffic Act, 1956 ([1956] Crim.L.R. 608, 673, 758), came into operation on January 1, 1957:

s. 5 (road-safety information and road training)
s. 6 (amending section 59 (1) of the Act of 1930, giving Minister power to make regulations)
s. 15 (control of dogs on roads)
s. 19 (provision of parking places where charges made)
s. 20 (amount of charges for parking and method of payment)
s. 21 (general provisions for regulation of parking places)
s. 22 (offences relating to parking places)
s. 23 (parking places: financial provisions)
s. 24 (parking places: supplementary provisions)
s. 41 (lighting-up time)
s. 47 (2) (appeals relating to road service licences)
Sched. 2 (travelling and other allowances for attendance at Road Safety Conferences)
Sched. 3 (procedure for orders designating parking places)
Sched. 8, para. 19 (minor and consequential amendments)
Sched. 9 in part (repeals).

ROAD VEHICLES LIGHTING (SPECIAL EXEMPTION) REGULATIONS, 1956 (S.I. No. 1959): operative December 15, 1956. Service vehicles proceeding from ports on return from the Mediterranean area to service depots in Great Britain are exempted until March 31, 1957, from showing two rear red lights at night as required by the Road Transport Lighting Acts, 1927 to 1953, if they carry one rear red light.

MOTOR VEHICLES (DRIVING LICENCES) (AMENDMENT) (NO. 2) REGULATIONS, 1956 (S.I. No. 1972): operative December 17, 1956.

The requirement of the principal regulations that the holder of a provisional driving licence must be accompanied by a qualified driver when driving a motor vehicle is amended, so that it no longer applies where the holder of that licence has held it on a previous provisional licence for one month or where he is a visitor to this country who has held a substantive licence without passing a test.

Speed limit: see p. 122, above.

Scotland

Education: see p. 122, above.
Pest control: see p. 129, above.
Police: see pp. 129, 130, above.
Public health: see p. 131, above.

Trade and Industry

REGISTRATION OF RESTRICTIVE TRADING AGREEMENTS ORDER, 1956 (S.I. No. 1869): operative November 30, 1956. Various classes of restrictive trading agreements set out in the Schedule to the Order are made subject to registration under Part I of the Restrictive Trade Practices Act, 1956 ([1956] Crim.L.R. 710). Particulars relating to agreements are to be furnished to the Registrar of Restrictive Trading Agreements within the period of three calendar months.

For penalties for contraventions, see sections 16 and 33 of the Restrictive Trade Practices Act, 1956.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

24. *Bringing child in need of care and protection before the court*

Section 67 of the Children and Young Persons Act, 1933, reads: "A constable . . . may take to a place of safety any child or young person . . . and a child or young person so taken to a place of safety . . . may be detained there until he can be brought before a juvenile court." How soon must a child or young person "in need of care or protection," as defined in section 61 (1) (*a*) for this particular case, be brought before a juvenile court?

I contend that a place of safety is a provision included in the Children and Young Persons Act to enable a child or young person to be kept other than at a police station—I appreciate that a police station is a place of safety—whereas any adult person detained can only be kept at a police station pending his appearance before a court. Apart from this, I maintain that a child or young person taken to a place of safety under the provisions of the above-mentioned section must be brought before a juvenile court as soon as practicable. My argument is based on section 38 (4) of the Magistrates' Courts Act, 1952—" Where a person is taken into custody for *an offence* without a warrant and is retained in custody, he shall be brought before a magistrates' court as soon as practicable." Against me is the contention that the child or young person has not been taken into custody for *an offence* but merely for his own protection and safety, and that an application only will be made to the juvenile court. Again, what of the parent who strongly opposes the removal of his child and wishes to " free " him at the earliest possible moment. I consider that such a child or young person has the right to appear before a court as soon as practicable in order that a magistrate may authorise his detention, otherwise it means that an offender has more rights than a non-offender.

I must concede that section 67 gives no indication as to how soon the child or young person must be brought before a juvenile court, but it has been suggested to me that the next ordinary sitting of the juvenile court would be soon enough. If this supposition is correct the position could have arisen in my district where a child or young person detained today, July 17, 1956, would not have appeared before the next juvenile court until August 20, 1956, a period of thirty-three clear days in custody. Under section 67 (2) a juvenile court is not empowered to make an interim order for a period longer than twenty-eight days so that would mean that a constable has greater powers of detention than a court. However, it must be admitted that the same section gives a constable the same powers as any person authorised by any court or by any justice of the peace. If the supposition is not correct then who decides how soon the juvenile court must be held?

I must also concede that section 40 of the Children and Young Persons Act gives a justice of the peace power to issue a warrant authorising similar detention of a child or young person who has been " subjected " to an offence mentioned in the First Schedule. [I. P.]

ANSWER

Once a child has been taken to a place of safety, being in need of care and protection, it must be brought before a juvenile court at the earliest opportunity. In the London area no difficulty arises, since a juvenile court sits daily and children from any area may be taken before the most convenient court. In places where the juvenile court is held monthly, the practice is to take the child before a single justice of the peace, who may make an interim order requiring the child to be placed in a remand home or a reception centre until its appearance before the next session of the juvenile court. Such order is enforceable for twenty-eight days and may be renewed though, in practice, the need therefor is rare. Thus the power of detention lies not in the constable but in the magistrate, and is derived from section 40 (1) of the Children and Young Persons Act, 1933. " A place of safety " includes a police station (see definition in section 107 of the Children and Young Persons Act, 1933). [J. S.]

Letters to the Editor

Reconsideration of Convictions

Sir,

In your commentary on *Ex p. Blackburn* [1957] Crim.L.R. 59 you remark: " It would seem, nevertheless, that there should be some machinery for the reconsideration of convictions (but not of acquittals), which subsequent decisions show to have been based on a wrong view of the law."

Lest your readers should assume that we have here a case of a wrong without a remedy, I would like to draw your attention to a leader which appeared in the *Law Times* of December 28, 1956, and in which, under the title " Remedy for Error? " the learned anonymous author, though he does not refer to *Blackburn's* case by name, deals with the very problem raised by your commentator.

The article shows that there are, in fact, two procedures, not mutually exclusive, which may be employed to obtain redress; namely, first, a reference by the Home Secretary of the case to the Court of Criminal Appeal under section 19 of the Court of Criminal Appeal Act, 1907, as amended by the Criminal Justice Act, 1948, s. 79 and Schedule 9, and, secondly, an application direct to the Court of Criminal Appeal to reconsider the case on the authority of *R.* v. *Taylor* [1950] 2 K.B. 368 where the court reconsidered its own decision in *R.* v. *Treanor* (1939) 27 Cr.App.R. 35.

Yours faithfully,
J. O. A.

Temple

[Mr. J. C. Smith writes: " The first procedure suggested perhaps goes some way towards meeting the point. But section 19 of the

Criminal Appeal Act merely empowers the Home Secretary to refer the case to the court 'if he thinks fit'; and apparently leaves the matter wholly within his discretion. If he declines to act it would seem that the aggrieved person can do nothing about it; he has no *right* to have his case reconsidered. In the present case it would seem very unlikely, in view of the attitude of the Attorney-General, that discretion would have been exercised in Blackburn's favour.

"It is difficult to see that *R.* v. *Taylor* has any bearing on the present problem. That case merely shows that the Court of Criminal Appeal has power, in certain circumstances, to overrule one of its own decisions as an authority upon the law when a subsequent similar case comes before it. The overruling of *R.* v. *Treanor* did not affect Treanor's conviction; he remained a convicted person unless and until he received a pardon. *Taylor* does not establish that a convicted person can himself re-open proceedings which have been decided against him in the Court of Criminal Appeal and, indeed, there would seem to be no authority for such a proposition."]

Books and Periodicals

Reviews:

Essays on the Law of Evidence. By Zelman Cowen, Barrister-at-Law, Professor of Public Law in the University of Melbourne, and P. B. Carter, Barrister-at-Law, Fellow of Wadham College, Oxford. Oxford University Press. London: Cumberlege. 1956. xvi and 270 and (index) 8 pp. (35s. net.)

Current Legal Problems, 1956. Edited by George W. Keeton and Georg Schwarzenberger. London: Stevens & Sons, Ltd. 1956. vii and 265 and (tables and index) 10 pp. (32s. 6d. net.)

Both these books contain essays on topics which are of absorbing interest to the criminal lawyer, but it is as well to state at the outset that whereas the contributions to *Current Legal Problems* constitute what might understandably be described as armchair reading, very much more effort is required of the reader who ventures into the *Essays on the Law of Evidence.* Some of the material contained in the latter volume, like Mr. Carter's painstaking examination of similar fact evidence, has already appeared in English and American periodicals, but it is extremely useful to have gathered together discussion of such topics as the admissibility of confessions, of facts discovered thereby, and of evidence procured by illegal means; the quantum of proof in criminal cases and a comparison with the standard required in civil and matrimonial actions; and the problem of unsworn statements by the accused as evidence of the facts stated.

No praise is too high for the joint authors' determination to scan the entire Commonwealth horizon—Australian, New Zealand, Canadian, South African, and some Indian authorities, not to mention, nearer home, decisions of the High Court of Justiciary, are all given great prominence by the liberal citation of extracts from statutes and judgments—in their endeavour to provide the fullest documentation possible by which to assess the value of currently held doctrines of the

English courts. Study of the varying points of view propounded by the United States Supreme Court and by lesser tribunals in some of the more prominent State jurisdictions is, of course, no longer an exceptional event in academic writing and proper attention is given to the American authorities. Where this volume of essays represents a landmark in legal writing is the mass of Commonwealth material which is examined and which should convince every reader of the valuable contributions made, and still to be made, to the development of the common law by the Commonwealth courts.

As to the conclusions reached by the authors, Wigmore's thesis that the exclusion of improperly induced confessions is based on the danger of admitting false evidence is not accepted as the exclusive or, indeed, primary reason of inadmissibility, preference being shown for a criterion describable as conformity to proper police methods and practice. The same attitude permeates the authors' treatment of evidence obtained through illegal searches and seizures, approval being given to the approach adopted by the High Court of Justiciary in *Lawrie* v. *Muir* 1950 S.L.T. 133. The law must strive to balance the interests of the citizen to be protected from illegal invasions of his liberties by the authorities and the interests of the State to bring to justice persons guilty of criminal conduct. The possibility, nay probability, that different courts will reach different conclusions on similar facts occasions no dismay, the authors being highly critical of the reasoning in *Kuruma* v. *The Queen* [1955] Crim.L.R. 184, particularly of the Judicial Committee's view that relevance is the decisive consideration in such cases. To the qualification referred to by Lord Goddard C.J. in that case that if the evidence had been obtained by an " unfair trick " it might properly be excluded, the authors pose the pertinent question—What is the principle which permits a judge in his discretion to exclude relevant evidence obtained by " an unfair trick " but does not apply to evidence obtained by illegal methods?

A strong case having been made out for accepting unsworn statements by accused persons as evidence of the facts stated, in the same way as the law at present regards the unsworn evidence of children, it is surprising to note at the end of this essay a plea for the abolition of this privilege (p. 218), for reasons which the present reviewer finds unconvincing. Accepting the necessity for appropriate safeguards in the prosecution's right to rebut by calling evidence and the court's power to draw the jury's attention to the unsworn character of the statement and the absence of cross-examination, it is submitted that the interests of justice are better served by the retention of this anomalous privilege. Finally, two comments in regard to the essay dealing with the already much canvassed problem of the standard of proof in criminal cases. It is pleasing to note the authors' statement that the use of the phrase " beyond reasonable doubt " is a distinctly superior means for conveying the desired standard of proof to a jury, not because it is more precise than all the other new formulae of " satisfaction," " full and thorough satisfaction," and " feeling sure," but simply because it is the time-honoured phrase which has acquired by usage an established meaning (pp. 248–249). Less acceptable, however, is the authors' violent disagreement with the doctrine, re-enunciated in the recent case of *Hornal* v. *Neuberger Products Ltd.* [1956] 3 W.L.R. 1034 *per* Hodson L.J. at pp. 1045–1046, that the standard of proof prescribed by law is capable of many degrees of variation according to the nature of the case and the punishment which may be awarded, though here, as throughout this book, the authors' analysis is deserving of the closest attention (pp. 252–253).

Much of Professor Dennis Lloyd's essay on " Obscenity and the Law " in the present volume of *Current Legal Problems* consists of a lucid and straightforward exposition of the development of the law, culminating in the attempt by Stable J. in the *Martin Secker & Warburg* case [1954] Crim.L.R. 593 to inject a much needed liberalising spirit into the *Hicklin* criterion of obscenity. The main features of the Society of Authors' draft bill (see [1955] Crim.L.R. 218–226) are outlined and supported as setting out in a practical way the broad lines upon which the present law may be improved.

Dr. Glanville Williams' choice of subject " Strict and Vicarious Responsibility in Crime " is prompted by several recent decisions of the Divisional Court, which lead him to underline opinions already elaborated in his *Criminal Law—The General Part*. Old fashioned though it may be, he is right to lament the current tendency to impose indiscriminate criminal punishment (p. 69), and to refute the argument often advanced in mitigation of the doctrine of strict liability, namely, that it is to be found only in trivial cases, which point of view cannot survive critical examination (p. 70). The present reviewer was particularly interested in the apparent acceptance by Dr. Williams of the view that inadvertent negligence has a place in the field of liability for statutory crime. Referring to the decision in *Green* v. *Burnett* [1955] Crim.L.R. 42, in which the driver of a motor-van was convicted for driving it with defective brakes, the writer points out that the court, in construing the relevant regulation as imposing an absolute prohibition, would hold the driver responsible if the brakes had unexpectedly developed a fault, even though he had used every care and had no reason to suspect the fault. Such a standard of liability, the writer urges, is too high, just as responsibility merely on the basis of *mens rea* is too limited. The solution says Dr. Williams, is to substitute, for specific types of legislation, the presumption of a requirement of *mens rea* by a presumption of a requirement of fault (including inadvertent negligence) (p. 60).

To the present reviewer's mind, this form of liability based on blameful inadvertence is equally acceptable in the special but wide class of statutory offences involving the use of epithets such as " suffers " and " permits " as a means of bridging the considerable gap between, on the one hand, liability judged by reference to a guilty mind in the form of actual knowledge or connivance and, on the other hand, strict liability. Dr. Williams, however, prefers in this respect to follow Devlin J.'s statement in *Roper* v. *Taylor's Central Garages Ltd.* [1951] 2 T.L.R. 284 that whereas wilful blindness is a substitute for actual knowledge " mere inadvertent negligence is not enough." The citation by the writer of *Callow* v. *Tillstone* (1900) 83 L.T. 411, as an authority to support this principle is not altogether satisfactory as that case involved a charge of aiding and abetting, a common law form of liability, which in this respect is essentially different from a substantive charge of " suffering " or " permitting," as in *Roper*. Whilst it is recognised (at least until the decision in *Davies, Turner & Co. Ltd.* v. *Brodie* [1955] Crim.L.R. 42) that inadvertent negligence does not constitute a culpable state of mind, where the accused is charged as a secondary party to the crime, there is a respectable body of authority which accepts this untraditional form of liability in statutory crime where the accused is charged as the principal party involved. Illogical though this distinction may appear at first sight it is one which, it is submitted, may legitimately be drawn having regard to the respective origins of the two degrees of responsibility—the former in the common law and the latter by statutory authority.

J. LL. J. EDWARDS.

The Food and Drugs Act, 1955. With an introduction by John A. O'Keefe, LL.B., B.SC.(Econ.), Barrister-at-Law and annotations to sections by Robert Schless, Barrister-at-Law. Reprinted from Butterworths' Annotated Legislation Service. London: Butterworth & Co. (Publishers), Ltd. 1956. x and 197 and (index) 14 pp. (30s. net.)

The Food and Drugs Act, 1955, is a consolidating Act, the major ingredients of which are the Food and Drugs Act, 1938; the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950; Part I of the Slaughterhouses Act, 1954, and the Food and Drugs Amendment Act, 1954. The earlier Acts had received much amendment, particularly by the Food and Drugs Amendment Act, 1954, but since that Act, with the exception of section 28 (relating to private slaughterhouses), did not come into operation until January 1, 1956, on which date the Act of 1955 also came into operation and repealed the Act of 1954, the result is that the 1954 Act has never been effective as an independent Act. This book makes the hitherto existing confusion a good deal less confusing. An introduction deals generally with the effect of the new Act and draws attention to the changes effected by the 1954 Act; and this is followed by the text of the Act, annotated section by section and by a Table showing where in the new Act the repealed provisions are reproduced. The annotations to the text contain references to the previous corresponding enactments, cross-reference to other relevant sections of the Act and numerous decided cases based on the similar provisions of previous Acts or analogous provisions of other Acts. It is gratifying to a researcher to find that in section 57, for example, where the words " in charge of any vehicle " appear, he is referred to section 15 (1) of the Road Traffic Act, 1930, and cases thereunder. This is the sort of annotation which may save hours of research. There can be no doubt that many practitioners and others will find this book most useful.

HENRY PALMER.

Books Received:

Road Traffic Offences. Second edition. By G. S. Wilkinson, Solicitor, Clerk to the Dudley Justices. London: The Solicitors' Law Stationery Society Ltd. 1956. xl and 221 and (appendices and index) 55 pp. (35s. net.)

The Reluctant Hangman. The story of James Berry, executioner 1884–1892. By Justin Atholl. London: John Long Ltd. 1956. 185 and (index) 3 pp. (16s. net.)

Famous Criminal Cases (3). By Rupert Furneaux. London: Allan Wingate. 1956. xxi and 209 pp. (15s. net.)

Late Sittings. By A. Laurence Polak, B.A.(HONS.CLASSICS),LOND., Solicitor of the Supreme Court. Illustrated by Leslie Starke. Chichester: Justice of the Peace Ltd. 1956. ix and 107 pp. (9s. 6d. net.)

The Greer Case. By David W. Peck. London: Cassell & Co. Ltd. 1956. xi and 209 pp. (13s. 6d. net.)

The Business of Crime. By Robert Rice. London: Victor Gollancz Ltd. 1956. 248 pp. (16s. net.)

Aspects of Murder. By T. C. H. Jacobs. London: Stanley Paul & Co. Ltd. 1956. 219 and (index) 4 pp. (16s. net.)

Quarter Sessions. Index of Common Penalties and Formalities. By G. N. C. Swift and R. L. Graham, Clerk and Deputy Clerk of the Peace of Cumberland. Chichester: Justice of the Peace Ltd. 1956. (10s. 6d. net.)

Craftsmen in Crime. A Continental Casebook. By Tom Fallon. London: Frederick Muller Ltd. 1956. 240 pp. (15s. net.)

Practical Forensic Medicine. By Francis E. Camps, M.D., Reader in Forensic Medicine (University of London) at the London Hospital Medical College, and W. B. Purchase, C.B.E., M.C., M.B., D.P.M., H.M. Coroner for the Royal Household and the County of London, Lecturer in Forensic Medicine at the University of London, Lecturer in Criminal Law, Royal Naval College, Greenwich. London: Hutchinson's Medical Publications Ltd. 1956. xviii and 491 and (appendices) 33 pp. (£3 15s. net.)

Reader's Digest:

Forensic science: Cryptophotography: *International Criminal Police Review*, November, 1956, 284.

Magistrates' courts: Probation officer's report; a summary of comments arising from Mr. Henderson's criticism of a report at Bedfordshire Quarter Sessions ([1957] Crim.L.R. 3): 8 *Probation* 58.

Medicine: The sale of medicines from vehicles: 120 *Justice of the Peace* 817.

Murder: The Homicide Bill: 106 *Law Journal* 788.

Poisons: The sale of poisons from vehicles: 120 *Justice of the Peace* 817.

Prisoners: After-care: 8 *Probation* 55.

Road traffic: Disqualification and endorsement: 120 *Justice of the Peace* 785.

Road traffic: Interpretation of the Act of 1956 ([1956] Crim.L.R. 608, 673, 758): 100 *Solicitors' Journal* 891.

Road traffic: Obstruction: 100 *Solicitors' Journal* 921.

Witnesses: Children as witnesses: 100 *Solicitors' Journal* 904.

Witnesses: Form of oath: 64 *Police Review* 920.

THE
CRIMINAL LAW
REVIEW

Editors
JOHN BURKE and PETER ALLSOP, M.A.
Barristers-at-Law

Editorial

Principles of punishment

Each year the Court of Criminal Appeal hears many appeals against sentence. In only a few cases does the court alter the sentence originally passed, but when it does so the reasons given are of importance and may serve as a guide to lower courts. In future we shall publish from time to time reports of sentence cases showing the considerations on which the Court of Criminal Appeal acts. The first reports in this new series appear at p. 155.

The principles which should govern the imposition of preventive detention and corrective training are still being evolved and therefore the observations of the Court of Criminal Appeal concerning these punishments are of particular importance. When a certain crime becomes more prevalent the Court of Criminal Appeal sometimes recommends that a more severe punishment should be imposed, as, for example, was the case in relation to lead stealing. Such cases will be covered in the new series and most of the cases there reported will probably not be published elsewhere. The reporting of decisions on points of law will not be affected ; such decisions will continue to be more fully dealt with in Case and Comment.

Homicide

Although subject to much stringent criticism in the House of Commons, the Government's Homicide Bill has been sent to the House of Lords unaltered in substance. Mr. Butler, opening the debate on the third reading in the Commons, considered the effect of the Bill as a whole and not in any great detail, but two points of interest arise from his speech.[1]

Referring to clause 2 of the Bill, under which murder may be reduced to manslaughter because of the accused's abnormality of mind, the Home Secretary said that this new defence "will enable the courts to take account of the great strides that have been made in the understanding of the human mind. . . . This is all part of the new approach to the problems of the mind which I think will exercise us, both at the Home Office and in this House, in the coming months and years." Although he waxed enthusiastic about this "exciting adventure," Mr. Butler did not make clear his intentions; perhaps reforms are to be made in prison treatment or perhaps the Home Secretary was referring to the time when homosexuality and prostitution come to be debated by Parliament.

Of the future exercise of the royal prerogative Mr. Butler said that he will continue to follow the policy of his predecessor. Each case will be considered on its merits, regard being had to the special considerations relating to that case and all relevant considerations of either a public or private nature.

Summary trial of minor offences

A Bill, the Magistrates' Courts Bill, has been introduced in the House of Lords giving effect to the recommendations of the Departmental Committee on the summary trial of minor offences. The Committee published its report in July, 1955 (see [1955] Crim.L.R. 538). The Bill provides that where a defendant notifies the court in writing of his desire to plead guilty, the case may be disposed of in both his absence and that of the prosecutor. The court may not impose imprisonment, detention or disqualification without first adjourning and giving the defendant the opportunity to appear. Provision is also made for taking into account the previous convictions of the defendant in his absence if the prescribed notice has been served on him.

Prison staff

A Departmental Committee is to be appointed with the following terms of reference:—To inquire into the remuneration and conditions of service in England and Wales and in Scotland of the Prison Officer grades up to and including Chief Officer, and the grades of Assistant Governor and Governor; and, in England and Wales, of Assistant Commissioner and Director: and to recommend what changes, if any, should be made, having regard to the efficiency of the service and the need for recruiting and retaining a sufficient and suitable staff.[2]

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[1] H.C. Debates, Vol. 564, cols. 456 *et seq.*; February 6, 1957.

Police methods

In Northern Ireland the Automobile Association protested recently against the use by the police of radar devices to assess the speed of cars because the Association doubt their accuracy. The Royal Ulster Constabulary claims that the accuracy and general efficiency of the radar speed meter are now well established. Such meters are used in the United States and a number of other countries. In Northern Ireland no error in the instrument has been detected and a full check for accuracy is carried out by the police operators every morning.

Police authorities in Britain have tested and rejected the radar speed meter, but the Royal Ulster Constabulary stated that this rejection " is not due to any doubts about its accuracy." [3]

The " mad bomber "

For sixteen years the New York police have been searching for a man who planted home-made bombs in public places such as railway stations and theatres, and now one George Metesky has been arrested on suspicion of being the " mad bomber." His capture was in the end surprisingly simple. Letters left with the bombs and sent to newspapers complained of unfair treatment by the Consolidated Edison Company. These were compared with records kept by the company and suspicion fell on Metesky, an old employee of the company who had unsuccessfully claimed compensation for an accident suffered in a " back draft of hot gases " in 1931.

Metesky is charged with felonious assault, malicious mischief and violation of the law against holding firearms, all the charges relating to one bomb explosion. He could be sentenced to forty-two years in prison.[4]

The jurors' oath

At the beginning of the year we drew attention to the new form of oath being used by jurors at the Old Bailey. As this has now been commended to quarter sessions for their consideration by the Lord Chief Justice (see p. 178, below), we should like to correct an error on our part. At [1957] Crim.L.R. 3 we stated that the jury formerly swore that they would " faithfully try the several issues"; in fact the jury formerly swore to "well and truly try" the issue and now they swear that they will "faithfully try the several issues."

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[2] See H.C. Debates, Vol. 563, col. *93*; January 25, 1957.
[3] See *The Times*, January 26, 1957.
[4] See *The Manchester Guardian*, January 24, 1957.

Judicial appointment

Mr. R. M. Wilson Q.C. has been appointed Recorder of the Borough of Croydon.

Occupational risk

When it was stated that a man found tampering with a car was hit on the head with a mallet, the North London magistrate, Mr. Frank Milton, commented: "That's one of the occupational risks of being a thief": The Daily Telegraph, *January* 30, 1957.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Writing Ink

By WILSON R. HARRISON, M.SC., PH.D.

Director of the Home Office Forensic Science Laboratory, Cardiff

It seems hardly fair when poets speak so highly of the pen that the only people who sing the virtues of ink are the copywriters who prepare those advertisements which proclaim the " perfect ink," or more modestly, the " ink of the century."

What is the perfect ink? It is to be feared that there is no simple answer to this question.

The lawyer who has to draw up important documents requires an ink which will retain its colour unimpaired, possibly for centuries and at the same time have no deleterious effect upon the paper or parchment to which it has been applied. For certain classes of documents, he may also consider that the ink should be one which will resist the action of the chemical bleaches or abrasives applied by the forger who wishes to effect some alteration in or obliteration of what has been written.

The business man who has a multitude of papers to sign would prefer an ink which, while showing no tendency towards drying up in the ink well or forming crusts on the nib of his fountain pen, will dry or at least be absorbed almost as soon as it touches the paper so that there will be no necessity for him to use blotting paper to prevent smudging of the writing.

The harassed mother of children is probably of the opinion that the perfect ink is one which can easily be washed out of clothes or table linen without leaving permanent stains of iron mould.

The manufacturers of pen nibs and fountain pens would enthusiastically support the claims of an ink which was entirely non-corrosive. With such an ink, they could utilise cheap metals chosen for their strength and other desirable qualities in the construction of their products and not be confined to the use of the expensive noble metals such as gold, platinum and iridium which have little to commend them but their resistance to corrosion.

To complete the list, there is a small minority who undoubtedly would give it as their opinion that the ideal ink for certain purposes would be one which vanishes completely without trace a short while after it is applied to paper! Many a profitable little swindle could be effected by the aid of such a useful fluid.

From the above, it is obvious that no one ink is ever likely to be considered perfect by everyone who has occasion to use it. Indeed, there is some doubt whether any single class of user referred to above will be likely ever to find an ink which is perfect for his purpose and this is in spite of the fact that ink of one kind or another has been in use for some thousands of years and continues even today to be the subject of widespread research by able chemists in many countries.

Indian ink

Although some authorities consider that the first ink was some form of vegetable varnish, there is no doubt that the oldest ink whose use became widespread is that invented by the Chinese some thousands of years ago. This ink, still in use in the East and, in a modified form, by artists all over the world, is commonly known as Indian ink.

Indian ink is simple in composition, being nothing more than impure carbon in the form of lamp-black made into a cake with glue. The lamp-black is best made by burning oily matter in a restricted supply of air and condensing the smoke on a cool surface. The ink is marketed as sticks or cakes and has to be prepared for use by grinding a little of the solid with water to form a suspension of the carbon in a dilute glue medium.

The colour of the ink, which varies from a dark brown to a violet black is controlled by the materials used for the preparation of the lamp black. The darker coloured inks are the more highly esteemed which is why it is sometimes the practice to " correct " the colour of the browner inks by the addition of blue colouring materials.

Liquid preparations in which the carbon is kept in suspension were introduced at a later date. These are more convenient to use but not so highly esteemed by the more critical users who still prefer to grind their own ink from the solid cake.

This rather muddy " carbon " ink as it is sometimes termed, is admirably adapted for use with the primitive reed pen. When applied to paper or parchment, the water soaks in or evaporates so that the writing consists of a layer of carbon held bound to the surface of the document by virtue of the dried glue film. If correctly prepared, this ink is practically neutral in reaction so that it neither corrodes the writing instrument if this be metal nor causes any deterioration of the paper or parchment to which it is applied.

Carbon is an extremely stable substance being unaffected by the action of light, air, moisture, acid fumes or microbiological attack. Carbon ink can be counted upon to last and retain its full colour as long as the material on which it is written remains intact.

Incidentally, carbon ink has another virtue which specially recommends it to the palaeographer. Carbon is peculiarly opaque to infra-red radiation, so that any writing in Indian ink which is on a stained and otherwise illegible document can easily be recorded on an infra-red sensitive plate even when all but the slightest vestiges of the original script have been erased. This has led to a number of important palaeographical discoveries. Parchment has always been expensive and as carbon ink writing can easily be scrubbed from its surface with little deterioration of the parchment, it has been the practice to use the same sheet of parchment for a series of writings. Many ancient manuscripts when photographed by infra-red have yielded information of inscriptions yet more ancient which had been almost completely erased prior to the re-use of the parchment.

In spite of its many virtues, carbon ink, even in its most improved modern form, is unsatisfactory for use with the ordinary pen so that in the West it has been completely superseded by far more suitable writing inks.

Iron-tannin ink

As far back as the eighth century (and some authorities give a much earlier date) it was discovered that when soluble salts of iron were mixed with extracts from the vegetable materials such as tanbark and nutgalls which were already in use for tanning hides, a liquid was obtained which rapidly darkened on exposure to air. This dark liquid was found to be very suitable for use as an ink with a new type of writing instrument—the quill pen, which was invented about that time.

The ink made in this primitive way was found to have a number of serious drawbacks. When freshly prepared, it was practically colourless so that it had to be allowed to mature in open vats until its colour reached sufficient depth to allow of its being used as an ink. Unfortunately, it was found that as the colour developed upon storage, a large proportion of the iron-tannin compound which gave body to the ink was thrown out of the solution to form a thick mud which clogged the pens as well as spoiling the appearance of the ink.

The effect of various additions to the ink was tried and by trial and error it was discovered that the addition of gum arabic hindered, even if it did not entirely prevent, the formation of the unwanted precipitate. In modern parlance, we would say that the gum arabic acted as a protective colloid.

For many centuries, the iron-tannin ink protected by gum arabic remained the standard writing ink, for chemical science had not made sufficient progress to allow of any substantial improvements to be made in its composition.

One thing which was discovered was that the nature of the tannin had an influence upon the colour of the ink and it was gradually realised that the best tanning material for hides was not necessarily the most satisfactory for the preparation of ink of good colour. Experience showed that ink of the finest colour could be made by the use of nutgalls as the source of the tannin so that iron-tannin ink is sometimes referred to as iron-nutgalls ink.

About the middle of the last century, a considerable advance was made in the preparation of iron-tannin ink. Most iron salts in use for ink making are acid in reaction so that the resulting inks are also slightly acid. The important discovery was that if the acidity of the ink were deliberately increased by the addition of acid, oxidation of the ink in storage was reduced to such an extent that no iron salts were precipitated even in the absence of gum arabic which thereafter was omitted from iron making recipes.

Unfortunately the acidified liquid provided an ink which was practically colourless. The colour developed slowly after writing; a period of several months elapsing before the ink reached anything like its full depth of colour.

To overcome this serious defect, Stephens in 1836 added to the ink of his manufacture a small proportion of indigo. Incidentally the use of indigo for this purpose had been mooted over seventy years before Stephens carried the suggestion into effect.

The indigo imparted a bright blue initial colour to the writing which was slowly masked by the violet-black tint of the iron compounds produced by the action of the oxygen of the air upon the other constituents of the ink. It is from this colour change from blue to black that this ink was named " Blue-black " a term which is still in use to designate iron-tannin inks which use a blue dyestuff to give a temporary colour to the writing although indigo is no longer the dyestuff of choice for this purpose.

Nowadays a number of much more suitable dyestuffs are available to the ink maker, the most popular of these being known as " soluble blue."

It is possible to make ink-like fluids by mixing, in almost any proportions, iron salts with tannin which itself may be drawn from one of a number of sources. Inks prepared haphazardly are unlikely to be of satisfactory quality, but for centuries after their discovery little was known of the standards to which inks of good colour and long life should conform. This serious gap of knowledge was filled between 1870–80 when work was carried out in Germany at the request of the Prussian Government and the recommendations of the investigators Schluttig and Neumann form the basis of the official specifications to which iron-tannin inks are made today.

Though by no means perfect, iron-tannin ink is still the most popular ink where good colour and permanence are required. It has the added advantage of being relatively cheap to make from easily available material and does not deteriorate appreciably in storage. Its most serious defect is that it must of necessity contain acid. It is this acid which corrodes the pen-nibs and, what is worse, accelerates the deterioration of the paper to which it is applied.

Any iron-tannin ink is necessarily slow-drying but as it is essential to keep up the concentration of the iron in the ink, the temptation to use blotting paper must be resisted. Blotting paper is the enemy of ink and there is no point in ensuring that ink contains a high concentration of iron compounds if the greater part of these is to be removed by the action of the blotting paper before they have had an opportunity of soaking into the paper to form the black insoluble iron gallotannate which gives the ink line its body.

Record ink

This is the term applied to those inks of high quality which are assured of long life under reasonable conditions of storage of the documents. A record ink should contain between 0·5 to 0·6 per cent. of iron with the smallest concentration of acid which is consistent with the good performance of the ink.

The availability of a good long-lasting ink for the preparation of important documents is considered so important that in 1932 the League of Nations published a report dealing with the permanence of papers which included recommendations as to the qualities of a permanent ink. Among others it was stated that a satisfactory ink should be thin and easy flowing, remaining substantially unaltered in an unstoppered bottle, but being quick drying with no suggestion of stickiness. The ink should contain sufficient iron and tannin so that when dry it would blacken and resist the fading action of both light and water yet not be so acid as to attack steel.

Some of these requirements are contradictory, as any ink which contains the recommended concentration of iron and tannin will have to contain sufficient acid to corrode a steel pen.

Fountain pen ink

What is usually termed " fountain pen " ink can be divided into two classes. The first class, which is often described as " blue-black permanent," is nothing more than a record ink which has been diluted with an equal volume of water. Incidentally, there is no reason whatsoever why record ink itself should not be used in the conventional fountain pen for which it is quite as satisfactory as any specially labelled " fountain pen ink."

The other type of ink, which is sometimes termed " non-staining," contains no iron salts, being little more than an aqueous solution of one or more synthetic dyestuffs. The colour of such an ink does not change on oxidation as is the case with the iron-tannin inks, and as the dyestuffs used are all soluble in water writing done with one of these inks will run and be rendered illegible when wetted.

By a careful selection of the dyestuffs it is possible to prepare what are termed " washable " inks. This term does not mean what at first sight might be assumed—that writing done with these inks would stand the effects of water as is the case with a " washable " distemper. On the contrary, it means that stains on fabrics caused by these inks can easily be removed by washing with no risk of leaving a stain of iron mould.

Synthetic dyestuffs form the basis of all coloured inks, whether intended for use in fountain pens or not. There is no black dyestuff commercially available which has sufficient tinctorial power to make a satisfactory black ink by itself in the concentrations usually employed, so that black inks generally contain a dark blue dyestuff as their main constituent with its colour modified by the addition of red and yellow dyestuffs.

These dyestuff inks are practically neutral in reaction and consequently are not corrosive. Unfortunately the very best of the dyestuffs available are by no means fast to light so that writing done with these inks slowly fades under the best conditions of preservation. Whilst quite satisfactory for everyday use, dyestuff inks cannot be recommended for writing on important documents.

The document examiner has at his disposal several methods whereby faded iron-tannin inks can be deciphered or possibly partially restored in colour, but where a faded dyestuff ink is concerned it must be confessed that in most cases little can be done to decipher the faded writing and nothing to restore its colour.

In recent years it is becoming the practice to add to inks small concentrations of what are generally termed " wetting agents." Although these are sometimes given fancy names by the ink manufacturers they are very similar to the active ingredients of the domestic detergents. These effect some improvement in the flow of the ink in a fountain pen and to some extent facilitate the absorption of the ink into the paper.

Copying inks

Copying ink is rarely encountered today but as a matter of interest it may be stated that a copying ink is a concentrated record ink to which have been added certain chemicals such as glycerine or dextrin. These additions retard the oxidation of the ink so that copies can be obtained some hours after writing.

Quick drying inks

It has already been mentioned that although ink has been in use for over a thousand years, research is still being vigorously prosecuted in the quest for an improved product. Nowhere is this better exemplified than in the efforts being made to formulate a practical, general purpose, quick-drying ink.

It may be of interest to consider in some detail what has been done in this field, so that an idea may be gained of the difficulties which are encountered when an attempt is made to effect a substantial improvement in a long established product.

Although a satisfactory general purpose quick-drying ink has been sought for many years, the first products were far from satisfactory. The replacement in whole or part of the slow drying water by a more volatile organic solvent such as alcohol or acetone was an obvious move, but inks made in this way have had but a very limited success. One of the difficulties was that the ink also tended to dry in the very place where it was required to remain liquid—in the bottle and at the pen point.

In more recent years a different line of approach has been tried. Instead of accelerating the evaporation of the ink, modifications in composition have been introduced to encourage its more rapid absorption into the paper. The earliest efforts in this direction involved the addition of non-volatile organic solvents to the ink. Being non-volatile, their presence would not increase the rate at which the ink dried in the bottle or the fountain pen so that these inks did not share the disadvantages of those containing acetone or alcohol, but experience showed that inks based on this principle were not only expensive but were too slow-drying to be of any practical value.

The next discovery was that the addition to ink of small quantities of a wetting agent resulted in the rapid penetration of the ink into the paper, but this line of approach was barred because it was found that if sufficient wetting agent were added to ensure rapid absorption of the ink, there was also an undesirable degree of lateral spreading of the ink over the surface of the paper causing " feathering " of the writing.

It has been known for many years that solutions of alkali not only penetrate well into cellulosic materials such as paper, but also increase the affinity of the cellulose fibres for any colouring matter which might be present. As early as 1912 suggestions were made that an alkaline ink containing potassium carbonate might prove quick drying through absorption and, when dry, resistant to water because of these two effects. Inks containing this alkali were found to be too slowly absorbed to be considered " quick-drying " because the potassium carbonate in the concentrations allowable was not sufficiently alkaline. Work on alkaline inks continued; in 1927 a patent was issued covering an ink containing caustic soda which proved to be sufficiently alkaline to be quick-drying by absorption. It was soon found that the high alkalinity which was necessary to ensure quick drying of the ink brought other troubles in its train. The most serious of these proved to be flooding of fountain pens, the inability to use any ink-forming iron salt in the presence of alkali and the unavailability of a range of dyestuffs for use in strongly alkaline solutions.

The last is an interesting point. Many thousands of dyestuffs have been synthesised and it might well be thought that among them would be some which were suitable for use in an alkaline ink. It must be remembered, however, that dyestuffs are produced primarily for dyeing textiles which is usually done from acid, neutral or mildly alkaline solutions so that little effort had been made to produce dyestuffs which were suitable for use in ink and at the same time able to resist the action of light whilst in the presence of strong alkali.

Research has been prosecuted vigorously, and to date well over a thousand new dyestuffs have been specially synthesised and tested in an effort to find the half-dozen or so required to produce a suitable range of alkaline dyestuff inks. As research was proceeding on the production of suitable dyestuffs the problem of the flooding of fountain pens was being investigated. The flooding was found to be due mainly to the spreading of the alkaline solution over the surface of the metal nib and, taking a hint from the methods used to concentrate ores by a process termed " froth flotation," where the crude ore is treated with chemicals which allow the unwanted dirt to be wetted and the desired ore particles to remain dry on subsequent treatment with water, it was discovered that the addition of small amounts of similar agents to the ink would control its tendency to flood.

This was not the end of the story. If preserved in a stoppered bottle an ink containing caustic soda will remain practically unaltered, but this is not the case when it is exposed to air when it will speedily absorb carbon dioxide which will not only reduce its alkalinity but at the same time clog the slit of the pen nib with an incrustation of washing soda.

At first sight this problem of preventing the absorption of carbon dioxide might appear to be insoluble, but recent theoretical work on the properties of thin films such as soap bubbles has indicated how an alkaline ink can be protected from attack by the carbon dioxide of the air. This is very simply accomplished by the addition of a carefully chosen wetting agent which concentrates in the surface of the ink film on the pen nib and so blocks off the carbon dioxide of the air from the alkali in the ink which remains substantially unaltered for long periods.

It has been mentioned that the rapid absorption of an alkaline ink is accompanied by a certain amount of undesired lateral spreading. This problem has been attacked by the research workers who have discovered that if a colloidal material such as cornstarch is added to the ink, lateral spreading is reduced to negligible proportions.

The researches have not ended here for no dyestuff ink can in any way be considered permanent. A permanent ink must contain a metal which forms a coloured oxide which will remain unaltered after all the other constituents have decomposed. As already stated, iron is ruled out but a rare metal, vanadium, has been found to be compatible with the constituents of an alkaline ink.

The modern alkaline inks recently placed upon the British market under the name of "Superchrome" are the product of many years of research in which several teams of investigators from university and research organisations have participated.

The Superchrome turquoise blue ink contains neither iron nor vanadium; instead, copper is present, probably in the form of a modified monastral blue, an excellent blue colouring matter discovered in this country by the chemists of Imperial Chemical Industries. The other ingredients are probably similar to those of the blue-black ink. The "jade green" is almost identical with the turquoise blue ink, except that its colour has been modified by the addition of a yellow azo dyestuff.

There is no doubt that the introduction of these inks is an important new departure. As all three contain metallic compounds they are likely to be as permanent as the best iron-containing record ink. They are acid-free and consequently unlikely to accelerate the deterioration of the paper. Their alkaline reaction is probably too slight to do any harm to the cellulose or other paper constituents. On being applied to the paper they are quickly absorbed so there is little temptation to remove the greater part of the ink with blotting paper. As might be expected, the speedy absorption of the ink is accompanied by a certain amount of lateral spreading which, however, is insufficient to cause feathering of the ink line.

Although the majority of the problems associated with the production of a quick-drying alkaline ink have been solved, these inks are never likely to supersede conventional inks for ordinary purposes. Not only are they necessarily more expensive but their use is restricted to a special range of fountain pens. The alkali present will attack the hard metal points of the conventional gold nib as well as the nitro-cellulose plastic from which the majority of fountain pens are made. For use with alkaline inks, special nib alloys have had to be developed and the pens themselves are made from a plastic resembling perspex which can be counted on to resist the attack of the alkali.

Document examiners are invariably interested when new products are placed upon the market for they bring with them certain advantages as well as new problems. The dating of entries on documents is in general a most intractable problem because of the extended use of dyestuff inks which furnish no evidence as to the age of the writing. Should entries be found to have been made in one of these newer inks, it is of course possible to give a limit of age to the writing.

Analysis of ink

At the present time about 80 per cent. of the writing ink which is used is of the neutral dyestuff type, the remainder being nearly all iron-tannin ink. Whilst the older books on document examination list elaborate tests for distinguishing between the relatively large numbers of different types of ink formerly on the market, these tests have little application today when the list has been reduced to two or three.

The document examiner is frequently asked whether he can analyse ink, by which is generally meant the examination of ink writings with a view to determining whether or not the same ink could be shown to have been used, or not used, for making all the entries.

It is seldom realised how difficult a task is presented by the examination of the ink on a document. Ink in the bottle may contain anything from about two to eight per cent. solid matter, the rest being water. When it is realised how much writing can be done with a small quantity of liquid ink, the majority of which is probably removed by blotting, one may visualise how minute is the amount of solid matter present in a part of a stroke of one letter which is all the analyst may remove for analysis without seriously defacing the document. With modern methods a great deal may be done with even this minute amount of material, but where the inks are of similar make-up it is usually impossible to determine whether the same ink has been used throughout.

Should inks in bulk be available for analysis, a great deal may be done to distinguish between them by estimation of the minor constituents even when they are of the same type making use of the same dyestuffs, but the microscopic amounts of material which may be removed from an ink line do not allow of this line of approach being made. Unless different dyestuffs have been used, or better still, the inks concerned are of different types, any attempt at the analysis of the ink on a document is likely to prove an expensive waste of time.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by Henry Palmer, *Barrister-at-Law*

Imprisonment

In R. *v.* OAKEY, the court (Lord Goddard C.J., Hallett and McNair JJ.: November 12, 1956) increased a sentence of twelve months' imprisonment to one of eighteen months. O. had been convicted at quarter sessions of malicious wounding on the following facts. O. was an attendant at a fun fair. A man riding in a " dodgem " car complained that he had not been given the proper change, whereupon O. struck him a blow which fractured his jaw and other blows about the head. As a result of this the man had to be taken to hospital with a compound fracture of the jaw and other injuries to his head. O. was thirty-four years of age and had a good character on discharge from the Navy but had been previously convicted of malicious wounding in 1953, when he was conditionally discharged. The court stated that this was a shocking offence for which twelve months' imprisonment was not sufficient punishment. The court was not obliged to shut its eyes to the fact that O. had been previously convicted of malicious wounding, even though he had been conditionally discharged. The court would take into account the fact that O. had behaved himself during the period for which he was conditionally discharged, but the sentence imposed by quarter sessions was not sufficiently severe for a brutal offence of this kind.

In R. *v.* BUTT, the court (Lord Goddard C.J., Cassels and Hinchcliffe JJ.: February 3, 1957) reduced sentences totalling nine years' imprisonment to seven and a half years'. The circumstances were that in September, 1956, B., together with another man, had assaulted and robbed two women who were taking wages from a bank to their place of employment. £465 was taken, and the offence was committed in London. B. then went to Lincolnshire with a girl of fifteen years of age and he was there arrested for housebreaking. Subsequently he was sentenced at Lincoln Assizes to three years' imprisonment for housebreaking and one year's imprisonment for having carnal knowledge of a girl under the age of sixteen years of age. B. was then brought before the Central Criminal Court where he was sentenced to four years' imprisonment for the original robbery. In addition he was sentenced to one year's imprisonment for striking the girl of fifteen (who was called as a witness for the prosecution) as she passed the dock on her way to the witness box.[1] All the sentences were imposed to run consecutively. B. was twenty-four years of age and had five previous convictions. The court stated that the total of nine years' imprisonment was longer than was approved by the court in such cases as a rule. The offence of carnal knowledge was not a serious one as the girl was nearly sixteen and B. was a young man. The sentences imposed at Lincoln would be altered to run concurrently. The sentence of four years' imprisonment for the robbery with violence would stand, as it ought to be known that men who committed this type of offence would be severely punished. But the sentence for the assault at the Central Criminal Court would be reduced to six months.

In R. *v.* BRETON, the court (Lord Goddard C.J., Hilbery and Slade JJ.: December 10, 1956) reduced a sentence of five years' imprisonment to one of three years' imprisonment. B., who was thirty-one years of age, had pleaded guilty to five offences of indecent assault on boys. He had held gymnastic classes in a boys' club in the course of which he had committed indecencies. The Court of Criminal Appeal stated that, as there were no particular features of aggravation in the case and as B. was a man of hitherto blameless character, five years' was too severe a sentence. The court would not say this was not a bad case ; it was, but three years' imprisonment was a sufficiently severe sentence.

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[1] The judge did not deal with this assault as a contempt of court, but ordered a bill of indictment to be preferred. The Court of Criminal Appeal expressly approved that course.

In R. *v.* MACASKILL, the Court of Criminal Appeal (Lord Goddard C.J., Cassels and Lynskey JJ.: January 21, 1957) reduced a sentence of five years' imprisonment to one of twelve months' imprisonment. M. had pleaded guilty to wounding with intent to cause grievous bodily harm. The facts were that M. became involved in a fight with another man, B., at a coffee stall. B. succeeded in getting the better of M., so that two plain-clothes police officers who were passing did not think it necessary to intervene. M. then went to a public lavatory and when he came out he had a small knife in his hand with which he jabbed B. in the back. The court stated that the use of knives would always be regarded with some seriousness, but in this case B. did not even know that he had been stabbed. The knife had gone through the cloth of his coat, but the wound was no more than a scratch which had to be attended to. M. was a man of thirty-one years of age, who had six previous convictions but he had never been in trouble for violence of any sort. The court held that the learned judge took too severe a view of this very minor stabbing affray in which a very small weapon was used upon a man who could take very good care of himself.

In R. *v.* ADAMS, the court (Lord Goddard C.J., Hilbery and Ormerod JJ.: November 26, 1956) reduced a sentence of twelve months' imprisonment in the following circumstances. A. had been conditionally discharged by quarter sessions for an offence of fraudulent conversion. During the period of conditional discharge, A. had committed two further offences, one of driving a motor-car while uninsured and one of being in possession of a shot-gun without a licence. A. had been brought back to the sessions where he had been sentenced to twelve months' imprisonment for the offence of fraudulent conversion. The court stated that technically A. had broken the conditions of his discharge, but the offence against the Road Traffic Acts was not an offence of dishonesty in any shape or form, and the offence of possessing a shot-gun without a licence was in this case a very small matter because there was no suggestion that the gun was to be used for a criminal purpose. This court did not think that A. was misbehaving himself so far as dishonesty was concerned. In the circumstances, the sentence would be reduced to one which would enable A. to be discharged forthwith.

Preventive detention

In R. *v.* FRAMPTON (Lord Goddard C.J., Hilbery and Ormerod JJ.: November 29, 1956), the court reduced a sentence of eight years' preventive detention to one of five years' imprisonment, with a supervision order under section 22 of the Criminal Justice Act, 1948. F. had pleaded guilty to breaking and entering a public-house and a dwelling-house and stealing money amounting to about £200. Three other larcenies were taken into consideration and also an offence of taking away a car without permission. F. had eight previous convictions, one for assault occasioning actual bodily harm, two for assaults on females and the rest for larceny. He was released from his last sentence in March, 1956, and the present offences were committed in July and August. The Court of Criminal Appeal stated that it was just possible to say that F. had not yet arrived at the stage when he ought to be sentenced to preventive detention.

In R. *v.* OXLEY, the court (Lord Goddard C.J., Hallett and Ashworth JJ.: November 5, 1956) reduced a sentence of seven years' preventive detention to one of four years' imprisonment. O. had pleaded guilty at quarter sessions to shopbreaking. He was thirty-three years of age and had twenty previous convictions, mostly in respect of small matters. His longest previous sentence was one of eighteen months' imprisonment. The court stated that, although they could understand why the sentence of preventive detention had been passed, they felt able to take a more lenient view for the following reasons. O. was released from prison in September, 1955, after serving a sentence of eighteen months'. Very soon after that he was sentenced to a month's imprisonment for begging. He had done odd days work as a kitchen porter and labourer, and had not asked for National Assistance or unemployment benefit. He had managed to keep out of trouble for just under a year and, in the circumstances, and because he had never had a long sentence, it was not yet necessary to send him to preventive detention.

Corrective training

In R. *v.* BEGAM, the court (Lord Goddard C.J., Hilbery and Slade JJ.: December 11, 1956) altered a sentence of three years' corrective training to one of two years' imprisonment with a supervision order under section 22 of the Criminal Justice Act, 1948. B. had pleaded guilty to storebreaking and larceny. B. was a bricklayer by trade and was employed by a firm in that capacity for a considerable period until he was laid off owing to lack of work. B. was twenty-four years of age and had five previous convictions. He was released from his last sentence of imprisonment in June, 1954. The court stated that, as B. was a man with a trade, he was probably not suitable for corrective training.

Fine

In R. *v*. DODD, the court (Lord Goddard C.J., Hilbery and Slade JJ.: December 10, 1956) refused to reduce a sentence of a £100 fine with £50 costs, with an alternative of six months' imprisonment, which was passed upon D.'s conviction for using premises for the purpose of gaming. D., who was thirty-five years of age, was a cripple who had no resources of his own and had eight previous convictions, of which one in 1948 was for assisting in conducting betting premises and one in 1949 for being in possession of lottery tickets for sale. The court stated that it had been realised that D. was probably using the premises on behalf of a bookmaker, and the fine was clearly imposed by the trial judge on the assumption that the person employing D. would pay. There was no reason why one person should not pay another's fine, and the court would not vary this sentence.

Borstal

In R. *v*. TAYLOR, the court (Lord Goddard C.J., Hallett and Pearson JJ.: November 19, 1956) dismissed an appeal against a sentence of Borstal training in the following circumstances. T., who was twenty years of age, was convicted at quarter sessions of taking and driving away a motor-car and driving whilst uninsured. He had previously been on probation and had been bound over for other offences. The Prison Commissioners did not recommend Borstal training, but he was nevertheless sentenced to Borstal training. The court stated that this was an obvious case for Borstal. The court had to remember that they were directed by statute not to send young men under twenty-one to prison unless there was no other way of dealing with them. In the circumstances of this case, the trial judge was quite right to disregard the opinion of the Prison Commissioners.[2]

A New Zealand Letter

From J. M. DWYER, *Barrister and Solicitor* (*N.Z.*)

Criminal law in New Zealand was largely codified by the Criminal Code Act, 1893. That Act followed very closely the provisions of the United Kingdom Bill of 1880, the work of the Criminal Code Commission which did not get enacted there. But the efforts of Sir James Stephens and the other commissioners have served New Zealand law well during the past sixty-three years. Important parts of the criminal law are, however, still the common law, for instance the defence of consent, and the application of the doctrine of *mens rea* to offences the statutory definitions of which do not refer to a mental element. The 1893 Act is now the Crimes Act, 1908. Very little change was made in 1908, and the report of the Criminal Code Commissioners which accompanied the 1879 draft of the United Kingdom Bill is frequently read here to clarify provisions of the criminal law. The Court of Appeal has on various occasions referred to it in interpreting the Crimes Act.

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[2] This case appears to conflict with *R*. v. *Tarbotton* (1941) 28 Cr.App.R. 92 in which it was said that it was "always inadvisable" to impose Borstal training contrary to the recommendation of the Prison Commissioners.

A Lie as Corroboration

The question of the sufficiency of a false statement of an accused as corroboration of the evidence of a complainant came before the Court of Appeal in *The Queen* v. *Vallance* [1955] N.Z.L.R. 811. The charge was indecent assault of a child, as in *Credland* v. *Knowler* (1951) 35 Cr.App.R. 48. In the English case the false statement of the accused related to his presence with the children at the place where the offence was alleged to have been committed. In the New Zealand case the statement established as false related to a reason put forward by the accused for taking the child to a particular shed. He said " I always take X with me as he knows where the key is kept." The prosecution was able to show by independent evidence that the child's knowledge of where the key was to be found did not form the motive for taking the child, because the accused already knew where the key was to be obtained. It was argued for him that a false statement, in order that it might constitute sufficient corroboration, must be a denial of the opportunity of committing an offence. It was not accepted, however, that this limitation should be placed on the enunciation of the proposition in previous cases, principally *Credland* v. *Knowler* (*supra*) and *Jones* v. *Thomas* [1934] 1 K.B. 323. The mere fact that a lie was told does not necessarily amount to corroboration, for it may, for instance, relate to a matter that is so immaterial or incidental that it could not be treated as corroboration. But if it, together with any other evidence that is independent of the evidence of the complainant, corroborates both the fact of an offence having been committed and the implication of the accused in the offence, then it is sufficient corroboration. In the *Vallance* case the Court of Appeal thought that the accused's false statement was properly left to the jury as evidence which they might accept in corroboration of the accused's implication.

"Obtaining" by False Pretence

In *The Queen* v. *Miller* [1955] N.Z.L.R. 1038 the Appeal Court considered the meaning of "obtains" in the statutory definition of false pretences. The accused had got a motor-truck by a false pretence, but since the transaction was a hire-purchase agreement he did not, and was not intended, to become the owner of the truck, unless and until he exercised the option to purchase and complied with the conditions under which he could effectively exercise that option. It was found that he did obtain the truck, notwithstanding that he obtained the possession only, and therefore that he was guilty of the crime of false pretences. This is one of the rare cases, apart from express statutory differences, where New Zealand law departs from English law. The judgment of the Court of Appeal traversed previous decisions, English and New Zealand, including of course that in *R.* v. *Kilham* (1870) L.R. 1 C.C.R. 261, which first clearly held that "obtains" in the comparable English provision means to get not mere possession but the property in whatever is obtained. The latter judgment brought out that the original provision relating to false pretences was enacted for the special purpose of defining a crime where a person got something as a result of a false pretence but, because the property passed voluntarily from the owner, a charge of larceny did not lie. There are some differences between the English and New Zealand provisions which could perhaps account for the different meanings given to "obtains." But in the main the judgment here turned on the prima facie meaning of the word. This certainly covers as aptly the getting of mere possession as it does the getting of the property. The result in *Kilham's* case was arrived at from a consideration of the history of the statute, and no doubt the judgment arrived at the true intent of the framers of the original Act. Still, at least in the New Zealand Crimes Act, the word "obtains" is unequivocal, until the history of the legislation is looked at. In section 252, in its context in the Act, "obtains" has an apparent meaning that includes the getting of possession only as well as the getting of the property in addition to possession; and no repugnance, inconvenience or injustice constrains the interpreter to search outside the Act for an equivocation. From the point of view of the interpretation of the ever widening field of statute law, the judgment in *Miller* is welcome. The real intention of a statute should, it is true, be sought, but for practical purposes the search must be limited to the Act itself unless something within it suggests that the true meaning has not been found. That seems better, notwithstanding that the limited search may not produce the best law. The result of *Miller's* case is that here from one transaction either a charge of larceny or false pretences might lie, which is perhaps a needless situation; for I have not noticed any case where an accused has been convicted of false pretences through the extended application of "obtains," and could not have been adequately dealt with for some other offence. For instance, in *Miller's* case a charge of obtaining credit by fraud could it seems have been established.

Interpretation of Statutes

The interpretation of statutes is a problem that continually confronts those dealing with the law, criminal or otherwise. In this subject no country seems to make real progress. The rules may in general be described as accepted and clear enough in principle, but we do not move towards an accepted and orderly system of applying them. In *C.* v. *Caskie* [1955] N.Z.L.R. 1146 a probationer asked the Supreme Court to discharge him from probation, this the court being empowered to do when half the term of probation has expired and there has been "a change of circumstances since the offender was released on probation." It was shown for the probationer that he had complied strictly with the terms of the order and generally behaved well, and it seemed that he could be expected to continue living a good life. But the court could not find from this that there had been a change of circumstances. It seemed a pity that by a too rigid adherence to the words rather than to the intention of the legislation, the judge limited the power to discharge in the very case in which we might have expected the power to be exercisable, namely, where it seemed that the offender had reformd. Regard for the intention might have found a change of circumstances in that at the time of the application for discharge it was reasonably apparent, whereas at the time of the order it was not, that the offender would not be likely to offend again. In another case the same court commendably rejected the literal interpretation of a penal section: *Shannahan* v. *W. F. C. A.* [1956] N.Z.L.R. 457. Section 110 (1) of the Licensing Amendment Act, 1948, requires a wholesaler to keep records of any sale of intoxicating liquor, unless the liquor is for delivery at a place where liquor may lawfully be sold. The particular sale had been made from the wholesalers' licensed premises, and the purchaser went away with the liquor he had bought. There was then a complete delivery at licensed premises, in most senses of the word "delivery." To have accepted the prima facie meaning here would have left a large gap in the amending Act. It would have provided a ready means of evading the intention that records of bulk purchases should be available to the authorities concerned with the detection of unlawful sales of intoxicating liquor. The court considered that " delivery " meant a delivery by a vehicle of the wholesaler, with the result that a record must be kept unless the liquor is handed over at licensed premises other than those of the wholesaler. Thus the literal meaning was rejected in favour of the true intention, notwithstanding that in the result the words " for delivery at a place where liquor may lawfully be sold " were left with little meaning, for sales to the holder of another licence had already been expressly dealt with.

Summons and Charge Headings Under The Road Traffic Act, 1956

By A. E. Jones

In two previous articles (see [1956] Crim.L.R. 739; [1957] Crim.L.R. 13) some examples were given of suitable headings for charges and summonses under the Road Traffic Act, 1956. Further examples are given below relating to sections of the Act not previously covered. Those under sections which have not yet come into force are marked by an asterisk. The headings are designed to describe the specific offence charged and therefore the usual commencement which is set out in Form 2 in the Schedule to the Magistrates' Courts (Forms) Rules, 1952, is not included.

Impersonating a vehicle examiner *

1. With intent to deceive did falsely represent yourself to be [*or* to be employed by] an authorised examiner contrary to section 1 (7) of the Road Traffic Act, 1956.

Falsification, etc., of test certificates *

2. With intent to deceive did forge within the meaning of the Forgery Act, 1913 [*or* alter *or* use *or* lend to one (*name*) *or* allow to be used by one (*name*)] a test certificate, contrary to section 112 (1) of the Road Traffic Act, 1930, as applied by section 1 (8) of the Road Traffic Act, 1956.

3. With intent to deceive did make [*or* have in your possession] a document so closely resembling a test certificate as to be calculated to deceive, contrary to section 112 (1) of the Road Traffic Act, 1930, as applied by section 1 (8) of the Road Traffic Act, 1956.

4. Did issue a test certificate which to your knowledge was false in a material particular in that (*give details*), contrary to section 112 (3) of the Road Traffic Act, 1930, as applied by section 1 (8) of the Road Traffic Act, 1956.

Using a motor vehicle without a test certificate *

5. On (*date*) did use [*or* cause *or* permit to be used] on a road a motor vehicle to which section 2 of the Road Traffic Act, 1956, applied, and as respects which no test certificate had been issued within the appropriate period before the said (*date*) contrary to subsection (1) of the said section.

*Obstruction of a vehicle examiner, etc.**

6. Did obstruct an authorised examiner acting under section 3 of the Road Traffic Act, 1956, contrary to subsection (4) of the said section.

7. Did fail to comply with the following requirement of section 3 of the Road Traffic Act, 1956 [*or* the First Schedule to the Road Traffic Act, 1956], namely, (*state requirement*) contrary to section 3 (4) of the said Act.

Causing death by reckless or dangerous driving

8. Did cause the death of one (*name*) by the driving of a motor vehicle on a road recklessly [*or* at a speed *or* in a manner which was dangerous to the public] contrary to section 8 (1) of the Road Traffic Act, 1956.

Having charge of a motor vehicle while under the influence of drink or drugs

9. When in charge of, but not driving a motor vehicle which was on a road [*or* on a public place] you were unfit to drive contrary to section 9 (1) of the Road Traffic Act, 1956.

Pedal cyclist disobeying requirement to give name and address

10. Being the rider of a bicycle [*or* tricycle] who was alleged to have committed an offence under the Road Traffic Act, 1930, of reckless [*or* dangerous *or* careless] driving did refuse to give your name [*or* address] on being required to do so by a person having reasonable ground for so requiring [*or* did give a false name *or* address on being required to give your name *or* address by a person having reasonable ground for so requiring] contrary to section 20 (1) of the Road Traffic Act, 1930, as applied by section 11 (1) of the Road Traffic Act, 1956.

Pedal cyclist failing to stop for a constable

11. When riding a bicycle [*or* tricycle] on a road did fail to stop the bicycle [*or* tricycle] on being so required by a police constable in uniform contrary to section 20 (3) of the Road Traffic Act, 1930, as applied by section 11 (1) of the Road Traffic Act, 1956.

Unauthorised cycle racing on highways *

12. Did promote [*or* take part in] an unauthorised race [*or* trial of speed] on a public highway between bicycles [*or* tricycles] not being motor vehicles contrary to section 13 (1) of the Road Traffic Act, 1956.

13. Did promote [*or* take part in] a race [*or* trial of speed] on a public highway between bicycles [*or* tricycles] not being motor vehicles, the said race [*or* trial of speed] not being conducted in accordance with the conditions imposed by [*or* under] regulations made under section 13 of the Road Traffic Act, 1956, in that (*give details of the contravention alleged*) contrary to subsection (1) of the said section.

Extension of prohibitions on sale of defective vehicles

There are a number of offences under this head and so the following method has been chosen as the clearest way of indicating the charge and summons headings.

14. Did sell [*or one of the following*
supply
offer to sell
offer to supply
cause to be sold
supplied
offered for sale
offered for supply
permit to be sold
supplied
offered for sale
offered for supply]

a motor vehicle [*or* a trailer] for delivery [*add as appropriate*—

(a) in such a condition that the use thereof on a road in that condition would be unlawful by virtue of a provision made as regards brakes [*or* steering gear *or* tyres] by regulations under section 30 of the Road Traffic Act, 1930;

or (b) in such a condition as respects lighting equipment [*or* reflectors *or* the maintenance of lighting equipment *or* reflectors] that it was not capable of being used on a road during the hours

of darkness without contravention of the requirements imposed by law as to obligatory lamps [*or* reflectors
and then complete] contrary to section 8 of the Road Traffic Act, 1934, as amended by section 7 (1) of the Road Traffic Act, 1956.

Dog not on a lead in a designated road

15. Did cause [*or* permit] a dog to be on a designated road without the dog being held on a lead contrary to section 15 (1) of the Road Traffic Act, 1956.

Offences in designated parking places

16. Being the driver of a vehicle did leave it in a parking place designated under the Road Traffic Act, 1956, otherwise than as authorised by (*name the relevant Order*) in that (*give details of the alleged contravention*) contrary to section 22 (1) (*a*) of the said Act.

17. Being the driver of a vehicle did leave it in a parking place designated under the Road Traffic Act, 1956, for longer after the excess charge had been incurred than the time prescribed under section 21 (5) of the said Act contrary to section 22 (1) (*a*) of the said Act.

18. Being the driver of a vehicle did fail duly to pay a charge payable under section 19 of the Road Traffic Act, 1956, in respect of (*give details*) contrary to section 22 (1) (*a*) of the said Act.

19. Being the driver of a vehicle did fail to comply with a provision of (*name the relevant Order*) requiring vehicles to stand in [*or* be driven into *or* out of] (*name the parking place in question*) in the following manner (*quote the relevant requirement*) contrary to section 22 (1) (*a*) of the Road Traffic Act, 1956.

20. Did contravene [*or* fail to comply with] article of (*name the relevant Order*) in that (*recite the alleged breach*) contrary to section 22 (1) (*b*) of the Road Traffic Act, 1956.

Fraudulent practices in relation to parking meters

21. With intent to defraud did interfere with a parking meter [*or* operate *or* attempt to operate a parking meter by the insertion of objects other than current coins of the appropriate denomination] contrary to section 22 (3) of the Road Traffic Act, 1956.

Additional requirements to produce driving licences to constables

22. Did fail to produce a licence granted under Part I of the Road Traffic Act, 1930, when required to do so by a police

constable after it had been revoked under section 5 (4) of the said Act and not delivered as required by that subsection [*or* by a police constable who had reasonable cause to believe that a false statement had knowingly been made for the purpose of obtaining the grant of a licence under Part I of the Road Traffic Act, 1930] contrary to section 31 (3) of the Road Traffic Act, 1956.

23. Being a person whom a police constable had reasonable cause to believe to have been the driver of a motor vehicle at a time when an accident occurred owing to its presence on a road

[*or* whom a police constable had reasonable cause to believe to have committed an offence in relation to the use of a motor vehicle on a road

or who accompanied the holder of a provisional licence while the holder was driving a motor vehicle on a road

or whom a police constable had reasonable cause to believe to have accompanied the holder of a provisional licence while driving a motor vehicle at a time when an accident occurred owing to its presence on a road

or whom a police constable had reasonable cause to believe to have accompanied the holder of a provisional licence while driving a motor vehicle at a time when an offence was suspected of having been committed by the said holder in relation to the use of the vehicle on a road]

did fail to produce your driving licence for examination on being so required by a police constable contrary to section 4 (5) of the Road Traffic Act, 1930, as amended by section 31 (4) of the Road Traffic Act, 1956.

Extended obligations to give particulars and produce certificates

24. Being a person whom a police constable had reasonable cause to believe to have been the driver of a motor vehicle at a time when an accident occurred owing to its presence on a road

[*or* whom a police constable had reasonable cause to believe to have committed an offence in relation to the use of a motor vehicle on a road

or who accompanied [*or* whom a police constable had reasonable cause to believe to have accompanied] the holder of a provisional licence while the holder was driving a motor vehicle at a time when an accident occurred owing to the presence of the vehicle on a road *or* at a time when an offence was suspected of having been committed by the said holder in relation to the use of the vehicle on a road]

did fail, on being so required by a police constable, to produce your licence for examination [*or* to give your name and address and the name and address of the owner of the vehicle, and to produce your certificate of insurance *add if appropriate* and the test certificate issued in respect of the vehicle] contrary to section 4 (5) of the Road Traffic Act, 1930, as extended by section 31 (4) of the Road Traffic Act, 1956 [*or* section 40 (1) of the Road Traffic Act, 1930, as extended by section 31 (4) of the Road Traffic Act, 1956].

25. Being the owner of a vehicle, namely a , the driver [*or* rider] of which was alleged to have been guilty of an offence under the Road Transport Lighting Acts, 1927 to 1953

[*or* under the provisions of the Road Traffic Act, 1956, relating to parking places

or against regulations made under section 10 of the London Traffic Act, 1924,

or against , an enactment relating to the use of vehicles on roads]

did fail to give such information as you were required by [*or* on behalf of] a chief officer of police, namely [*or* in writing, by *or* on behalf of the local authority for the parking place in question, namely] to give as to the identity of the said driver [*or* rider] contrary to section 113 (3) (*a*) of the Road Traffic Act, 1930, as extended by section 32 (1) of the Road Traffic Act, 1956.

26. When so required by [*or* on behalf of] a chief officer of police, namely [*or*, in writing, by *or* on behalf of the local authority for the parking place at] did fail to give information which it was in your power to give and which might have led to the identification of the driver [*or* rider] of a vehicle, namely , who was alleged to have been guilty of an offence under the Road Transport Lighting Acts, 1927 to 1953 [*or* under the provisions of the Road Traffic Act, 1956, relating to parking places *or* against regulations made under section 10 of the London Traffic Act, 1924, *or* against , an enactment relating to the use of vehicles on roads] contrary to section 113 (3) (*b*) of the Road Traffic Act, 1930, as extended by section 32 (1) of the Road Traffic Act, 1956.

Offences in connection with the sale of protective helmets *

27. Did sell [*or* offer for sale] a helmet as a helmet for affording protection to persons on or in motor cycles from injury in the event of accident, the said helmet being neither of a type prescribed under section 42 of the Road Traffic Act, 1956, nor of a type authorised under regulations made under the said section and sold [*or* offered for sale] subject to the conditions specified in the authorisation contrary to subsection (2) of the said section.

28. You were the person to whose act or default was due a

contravention of section 42 of the Road Traffic Act, 1956, of which the said (*informant*) has been accused, namely that a helmet was sold [*or* offered for sale] as a helmet for affording protection, etc. (*continue as in the previous form*) contrary to subsection (2) of the said section and the Seventh Schedule of the said Act.

29. That he (*the informant*) is reasonably satisfied that you were the person to whose act or default was due a contravention of section 42 of the Road Traffic Act, 1956, namely that a helmet was sold [*or* offered for sale] as a helmet for affording protection, etc. (*continue as in form* 27) and the said (*informant*) is also reasonably satisfied that the original offender could establish a defence under paragraph 1 (1) of the Seventh Schedule to the said Act.

Misapplication of warranties regarding protective helmets *

30. In proceedings against (*name of defendant/s*) at (*name of court*) on (*date*) for an offence under section 42 of the Road Traffic Act, 1956, did wilfully apply to a helmet a warranty not given in relation to that helmet contrary to paragraph 5 (1) of the Seventh Schedule to the said Act.

Giving false warranties regarding protective helmets *

31. Did give to (*name of purchaser*) a false warranty in writing in respect of a helmet sold by you, the said helmet being one in respect of which a warranty might be pleaded under paragraph 4 of the Seventh Schedule to the Road Traffic Act, 1956, contrary to paragraph 5 (2) of the said Schedule.

Failure to produce a work ticket in relation to a public service vehicle

32. Being the driver of a vehicle, did, on demand by a police constable in uniform [*or* by a person authorised by the Traffic Commissioners], fail to produce for inspection by the said constable [*or* person authorised] a work ticket carried by you under paragraph 14 of the Sixth Schedule to the Road Traffic Act, 1956, contrary to paragraph 14 (3) of the said Schedule.

Failure to preserve records in relation to a public service vehicle

33. Being the holder of a public service vehicle licence, did fail to preserve, for a period of six months from the date on which it was made, a record you had made [*or* caused to be made] in pursuance of paragraph 14 (1) of the Sixth Schedule to the Road Traffic Act, 1956, namely a (*specify the record*) contrary to paragraph 14 (4) of the said Schedule.

Failure to produce records in relation to a public service vehicle

34. Being the holder of a public service vehicle licence, did, on being so required by (*name*), a person authorised by the Traffic Commissioners, fail to produce for inspection by the said (*name*), within six months from the date on which it was made, a record made [*or* caused to be made] by you in pursuance of paragraph 14 (1) of the Sixth Schedule to the Road Traffic Act, 1956, namely a (*specify the record*) contrary to paragraph 14 (4) of the said Schedule.

Altering public service vehicle records with intent to deceive

35. With intent to deceive did alter an entry in a record made under paragraph 14 of the Sixth Schedule to the Road Traffic Act, 1956, namely (*give details of the alteration*) contrary to paragraph 14 (5) of the said Schedule.

"Satisfied Beyond Reasonable Doubt"— Canadian and Australian cases

By Maurice Lush, *Barrister-at-Law*

The discussion which has taken place in connection with the proper direction of the judge as regards the onus of proof in criminal cases has been confined to certain cases in the Court of Criminal Appeal in this country, *e.g., R.* v. *Kritz* [1950] 1 K.B. 82; *R.* v. *Summers* (1952) 36 Cr.App.R. 14; *R.* v. *Murtagh and Kennedy* [1955] Crim.L.R. 506; *R.* v. *Blackburn* [1955] Crim.L.R. 323 and *R.* v. *Hepworth and Fearnley* [1955] Crim.L.R. 576.[1] It may, therefore, be helpful in an examination of this position to see how the courts in Canada and Australia have approached this particular problem. In certain of the Canadian cases the judgments show a difference between a direction to the jury of "proved beyond a reasonable doubt," and expressions such as "proved to their satisfaction" and "clearly proved," and these differences have been considered in arriving at the proper direction to the jury on the onus of proof in cases where insanity has been set up as a defence. These judgments have re-affirmed that a prisoner is entitled to a direction to the jury of " proof beyond a reasonable doubt " as regards his guilt, but to a direction of proof consisting of a preponderance of the weight of evidence only as regards his defence of insanity. This distinction, and the need of such a direction as " proof beyond a reasonable doubt " as regards guilt, is stated in the Australian case.

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[1] See "The Direction to the Jury on the Burden of Proof," by Dr. Glanville Williams [1955] Crim.L.R. 464.

Canadian cases

In the first case *R.* v. *Anderson* (1914) 26 *Western Law Reporter* 783, the jury in a case where insanity was the defence had been directed by the trial judge that before they could acquit on the ground of insanity, they " must be satisfied beyond a reasonable doubt that this man's reason was dethroned, that he was incapable of exercising judgment and incapable of knowing right from wrong at the time." On appeal this was held by the majority of the Supreme Court *en banc* to be a misdirection; the trial judge should have told the jury that such defence must, in order to be effective, be " proven to your satisfaction " or " clearly proven," these being the words appearing in the answers given by Tindall C.J. in *McNaghten's Case* (1843) 10 Cl. & F. 200. In his dissenting judgment, however (with which the trial judge, Simmons J., agreed) Harvey C.J. stated that he could see no ground, on principle or authority, for concluding that the rule as to proof in civil cases had any application in the case then before the court which was not a civil case, the degree of proof in which was clearly declared by the judges in the *McNaghten* case. He says (at p. 811): " It is apparent that the only question to be determined is, whether ' satisfying beyond a reasonable doubt ' requires a higher degree of proof than ' proving to the satisfaction ' or ' clearly proving.' With the meaning I attach to the word ' satisfy ' I find myself unable to conceive how I can be satisfied that a thing is so, if I have any reasonable doubt that it is so." But he goes on to say (at p. 813): " There is no doubt that a distinction has long been recognised between the character of proof to establish guilt of a crime and that to establish a civil claim," and he stated that, although the word in s. 19 (3) of the Canadian Criminal Code was " proved " only, he saw no reason to think that this word was used in any other sense than that in which it has been used ever since *McNaghten's* case when used in this application. On the other hand in his judgment agreeing with the majority of the court Stuart J. was of opinion that the trial judge gave an improper direction to the jury. He points out that, if it is decided that nothing was added by the use of the phrase in the direction " beyond a reasonable doubt," then it logically follows that the use of the language of *McNaghten's* case must be considered as equivalent to the language used by the learned trial judge; and therefore that it also follows that the use of the language of *McNaghten's* case, *viz*., the use of the simple expressions "satisfied" and "clearly proven" without any additional expressions of earnest emphasis by the judge would (except in a case where a special defence was raised the burden of proving which is by law upon the accused), be quite sufficient to satisfy the well-known rule in favour of an accused, that the jury must be satisfied of his guilt "beyond a reasonable doubt," before they should convict him. He rejects this view, however, saying (at p. 804): "Are we then to say that it is not necessary to use that now classic expression, or at any rate any words of stronger and more impressive meaning than the words used in *McNaghten's* case in charging a jury with respect to the degree of certainty which the prosecution must create in their minds as to a prisoner's guilt before a verdict of guilty can be rendered, but that the prisoner cannot demand anything more than the use of such expressions 'satisfied' and 'clearly proven.' That appears to me to be the logical result of sustaining the direction to the jury in the present case; and I hesitate to do anything which would lead to that result." Then dealing with Harvey C.J.'s observations he says: "It may indeed be, as the Chief Justice points out, hard to express any intelligible distinction between the two phrases; but, for myself, I cannot undertake to do anything which necessarily involves the removal of the protection which, it has always been understood, the necessary use of the expression 'beyond a reasonable doubt," or at any rate words of similarly emphatic meaning, has given to an accused person. If the expression was not improper in the present case, then it inevitably follows that it is not necessary in the ordinary case. I think that the rule is well-established that an accused person is entitled to have such a direction given." In agreeing Beck J., with whom the two remaining members of the court concurred, says of the distinction between "proved beyond a reasonable doubt," "proved to their satisfaction" and "clearly proved" (p. 788): "Whether there is in psychology an admissible distinction of meaning in these three expressions, and, if so, what that distinction is, it seems to me it is not necessary to inquire. The expression 'satisfaction beyond a reasonable doubt' has become consecrated by long judicial usage as pointing to a state of mental satisfaction in some sense greater than 'satisfaction' *simpliciter* or that state of mind induced by proof that is merely 'clear.' . . . In view of the authorities and opinions I have referred to, it must also be accepted that there is a clearly recognised distinction between being satisfied beyond a reasonable doubt and being merely satisfied or having clear proof."

R. v. *Kierstead, Clark* v. *The King*

In the second case, however, a contrary view was stated, and it was held by the Supreme Court of New Brunswick in *R.* v. *Kierstead* (1918) 45 *New Brunswick Reports* 553 that the defence of insanity must be established beyond a reasonable doubt. In giving the judgment of the court and referring to the *McNaghten* case White J. said that insanity of the prisoner could not properly be said to have been proved to the satisfaction of the jury, while the result of the evidence was to leave in their minds a reasonable doubt as to whether the prisoner was in fact insane. He then pointed out that the words of the judges in their answers are " that to establish a defence on the ground of insanity it must be *clearly proved*," etc. This conflict has since been resolved by the Supreme Court of Canada in the last case, *Clark* v. *The King* (1921) 61 *Supreme Court Reports* 608 in favour of the view expressed in *Anderson's* case, and it was held by a majority, overruling *Kierstead's* case, that it is a misdirection for a judge to charge the jury that insanity must be proved beyond a reasonable doubt. It may be noted that even the one dissenting member of the court, Idington J. in disagreeing, referred to the reason for the direction to the jury in a criminal case, namely, that a member of society has been most justly protected for ages, by the use of a judicial formula, as it were, lest passion and prejudice should prevail and injustice be done. He says (at p. 615): " It must be determined first whether or not upon the evidence bearing upon the actual perpetration of the offence, the accused can be found ' beyond reasonable doubt ' guilty," and he then states that as regards insanity the finding must be subject to the like limitations of proof " beyond reasonable doubt." In agreeing with the majority Duff J. (with whom Brodeur J. concurred) refers to the presumption of innocence, saying (at p. 618): " The law presumes innocence but it prescribes also a supplementary rule, namely, that in criminal proceedings, at all events, the presumption of innocence is not rebutted unless the evidence offered for that purpose demonstrates guilt in the sense of excluding to a moral certainty all hypotheses (not in themselves improbable) inconsistent with guilt. . . ." He then refers to the direction as to guilt in a criminal trial, saying: " I have moreover no doubt that the expressions which have for generations been used by judges in instructing juries in criminal proceedings as to the degree of certainty justifying a conviction (as ' the prisoner must be given the benefit of the doubt,' ' guilt must be established to the exclusion of reasonable doubt '), are expressions which have passed into common speech; and that a Canadian jury receiving instructions couched in similar terms as to the probative weight of the evidence necessary to justify a given conclusion would in the great majority of cases attach to these expressions the significance which they ordinarily bear and are intended to bear when used in relation to the presumption of innocence. A jury being instructed that a finding of insanity would only be proper if they should be satisfied to the exclusion of all reasonable doubt upon that point, would not, I am quite sure, understand that an affirmative conclusion would be justified by proof consisting only of a substantial preponderance in the weight of evidence." Anglin J. in agreeing stated that he quite appreciated the difficulty experienced by Harvey C.J. and by White J. as stated above, in formulating the distinction between proof to the satisfaction of the jury and proof beyond reasonable doubt, posing the question how could he be satisfied of a fact if he had reasonable doubt that it was so. He does however identify himself with the above views of Beck J. saying (at p. 627): " But, with Mr. Justice Beck . . . I am convinced that the expression ' proved beyond reasonable doubt ' has become consecrated by long judicial usage as pointing to an amount or degree of proof greater than is imported by the word ' proved ' standing alone or by the expression ' established to the satisfaction of the jury,' or even by ' clearly proved '—certainly greater than is required to discharge the burden of proof in civil matters," and he refers to the English case of *Doe* d. *Devine* v. *Wilson* (1855) 10 Moo.P.C. 502. He then says as regards this distinction: " But the actuality of the distinction in law between an instruction that the existence of a fact or condition must be proved and that it must be proved beyond a reasonable doubt is perhaps best tested by the inquiry whether an accused would not have ground for complaint if the trial judge having charged that the jury must be satisfied of his guilt—that it is clearly proven—should refuse to direct them that they must be so satisfied beyond reasonable doubt. I put that question to counsel for the Crown during the argument. It was not answered. I find it was anticipated by Mr. Justice Stuart in *Anderson's* case. . . . With that learned judge I think the rule is well established that an accused person is entitled to have such a direction given," and he refers to the English cases of *R.* v. *Stoddart* (1909) 2 Cr.App.R. 217; *R.* v. *Schama and Abramovitch* (1914) 11 Cr.App.R. 45, and *R.* v. *White* (1865) 4 F. & F. 383 as instances of the recognition of this right in English law. In agreeing Mignault J. says (at p. 631): " It is unquestionable that guilt must be proved beyond a reasonable doubt so that the presumption of innocence is stronger, and rightly so, than the presumption of sanity. Proof in ordinary matters does not suppose that the evidence removes all doubt; it is the result of a preponderance of evidence, or of the acceptance on reasonable grounds of one probability in preference to another, and, in the case of insanity, the evidence generally is largely a matter of expert opinion. To say that insanity must be proved to the satisfaction of the jury does not weaken the legal presumption, but it places the plea of insanity on the same footing as all other defences which must be established so as to satisfy the jury."

Cases where this last decision was followed and applied are *R.* v. *Lobbins* [1940] 4 D.L.R. 548; *Smythe* v. *The King* [1941] 1 D.L.R. 499; *R.* v. *Gibbons* [1947] 1 D.L.R. 45; *R.* v. *Chupiuk* [1950] 1 D.L.R. 481. The connection between reasonable doubt and the presumption of innocence was stressed by McGillivray J.A. in *R.* v. *Labine* [1937] 4 D.L.R. 284, where, after referring to *Clark's* case, he says: " In other words, in criminal cases in which juries are the judges of the facts they must be told in appropriate words that because of the presumption of innocence the burden of establishing guilt is upon the Crown and that that burden is not lifted until proof beyond a reasonable doubt has been made. It is not necessary, although perhaps safer, to use the words beyond ' reasonable doubt,' but these words or words conveying the same meaning must be employed." For a definition of reasonable doubt see *R.* v. *Sears* (1948) 5 C.R. 1.

Australian Cases

The appeal in the Australian case *Sodeman* v. *The King* [1936] 2 All E.R. 1138, came before the Judicial Committee of the Privy Council. In the Supreme Court of Victoria ([1936] *Victorian Law Reports* 99), objection was taken at the hearing before the full court upon the application for leave to appeal against conviction for murder, and also in the High Court of Australia ([1936] *Victorian Law Reports* 131) on appeal from the refusal of such application, and also in the Privy Council (above), to the terms of the direction to the jury on the onus of proof which lay on the accused to establish his insanity which he had set up as a defence. There the learned trial judge had directed the jury thus (see the headnote of the report of the appeal to the High Court [1936] *Victorian Law Reports* 131): " The accused himself has the burden of proving clearly to you that insanity did exist; the burden is no longer on the Crown. The Crown is under no obligation to prove that he was sane—the obligation is his to satisfy you that he was insane at the time of committing the offence. Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes until the contrary is proved to the satisfaction of the jury. The jury must decide on all the evidence the question of insanity." In the Supreme Court Mann C.J., in referring to the case for the appellant, stated ([1936] *Victorian Law Reports* 101) that it had been said that in the use of each and every one of the above expressions (which the Chief Justice had paraphrased) the learned trial judge was speaking entirely in accordance with the language used by the very highest English tribunals and that indeed was not disputed, but that it was urged by the appellant that in Australia, at all events, it had become proper and, as a matter of law, necessary that the learned trial judge dealing with this subject should go further than merely describe the burden of proof in such language as that to which he had referred, and should elaborate or explain to the jury with more refinement and more nicety what was meant by telling them that they must be satisfied. He went on to say that in particular the argument, he thought, was put thus (and it is clear that he accepted as correct the statement of the law which follows): " It is now the law that, upon the issue of guilty or not guilty, it is not a sufficient charge to tell the jury that the guilt of the accused must be established, or that the guilt of the accused must be established to their satisfaction, but other cautionary words must be added pointing out to them that the law requires a special degree of certainty, upon this issue of guilty or not guilty, which is generally expressed by the words ' beyond all reasonable doubt ' or some equivalent phrase. And the argument addressed to us here was in effect that in like manner it is necessary, as a matter of law, to explain to the jury on other questions, and in particular upon the question of insanity, what the word ' satisfied,' or what the words ' clear proof,' and the like, mean, and that it should be pointed out to them that they are to be distinguished in some clear way from the burden which lies upon the Crown in the issue of guilty or not guilty." This argument was rejected and the appeal was dismissed, and this decision was affirmed on appeal by the High Court of Australia, although the opinion of the judges was divided. The appeal to the Privy Council was dismissed, and in giving the judgment of the Board Lord Hailsham L.C. says: " Their Lordships do not think that that question whether or not the language used was enough clearly to bring the matter home to the jury in the particular case—it is not a question of general legal importance, but only a question of the exact turn of the phrase—can, except in a very clear case, be a ground for exercising the very exceptional jurisdiction which is reserved to the Board in criminal cases." In so deciding the Lord Chancellor stated that the Board were satisfied that there was no doubt in the minds of any of the courts below as to what the law really was, and that they were quite satisfied to accept the view of the courts below that the language used was not such as would be misunderstood by the jury, or as would be capable of misleading the jury as to the onus.

As regards the question of onus the Lord Chancellor had previously stated the distinction between onus of proof as to guilt, and of onus of proof of insanity which rests upon the defendant. He says: " The other point is that the trial judge in directing the jury as to the burden of proof, having stated that it was for the Crown to establish its case beyond reasonable doubt, went on to say that the burden of proof in a case of insanity rested upon the accused, and the suggestion made by the petitioner was that the jury may have been misled by the judge's language into the impression that the burden of proof resting upon an accused to prove insanity is as heavy as the burden of proof resting upon the prosecution to prove the facts which they have to establish. In fact there is no doubt that the burden of proof for the defence is not so onerous. It has not been very definitely defined. The Canadian case of *R.* v. *Clark* was referred to, but even there the judges were not able to find a very satisfactory definition, but it is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings. That this is the law is not challenged, and no court in Australia has decided otherwise."

Recently the Court of Criminal Appeal in New South Wales in *R.* v. *Stoner* (1955) 72 W.N.(N.S.W.) 465, after referring with approval to the above passage, went on to state that in the case of murder, as in any other case, the onus is always upon the Crown to show the guilt of the accused, and this beyond reasonable doubt.

Practice and Procedure

The Admissibility of Maps

In two recent criminal cases modern maps have been received in evidence. The first of these was the case of *R.* v. *Barber, Green, Hutchings and Williams*, a case of larceny and receiving stolen property tried at London Sessions at the beginning of January. A point that was in issue in that case and that was very strongly pressed in cross-examination and argument by the defence was the distance between two street junctions. Counsel for one of the prisoners, Green, put in a very large scale ordnance survey map of the district made in 1953, and counsel for the prosecution said that he could not agree to that being admitted. The judge admitted the map without legal argument.

The second case was *R.* v. *Reid*, a trial for wounding with intent to murder tried by Pilcher J. at the Central Criminal Court on January 17, 1957. There, alternative routes and distances were in issue and the defence handed in an up-to-date book containing maps of London, not being ordnance survey maps. This book was admitted without any question being raised as to its admissibility.

In civil cases it appears to be well established that an ordnance survey map is admissible to show physical features of land as distinct from such matters as questions of rights, title and boundaries (see *e.g.*, Phipson on *Evidence*, 9th ed., 372, 394). It is not altogether clear whether the same ruling applies in criminal cases, although it is difficult to see why any distinction should be made, particularly as questions as to physical characteristics of land, especially as to distance, so frequently arise in criminal cases. In Archbold's *Criminal Pleading*, 33rd ed., 436, it is stated: " Modern maps, or plans, even ordnance maps, are not admissible (*R.* v. *Milton* (1843) 1 C. & K. 58, 61), except as part of the evidence of the person who made them, or unless they can be shown to bind in some way the person against whom they are tendered (*Mercer* v. *Denne* [1905] 2 Ch. 538 . . .) or *semble* unless their accuracy has been verified by the personal examination of the *locus in quo* by the witness who produces them." *R.* v. *Milton* was a case upon indictment for the non-repair of a highway and the admissibility of a map was in issue. However, the point in respect of which this evidence was required was whether or not a road was within a certain parish and, of course, a parish boundary is an arbitrary line not apparent on the surface of the land and therefore not a visible physical characteristic of the land. Furthermore, in that case, the map was not an ordnance survey map, but a map prepared under an Inclosure Act and that Act was a private Act that was not proved at the trial; also the map was not by any means a modern map for at the time of the trial (1843) it was thirty-four years old. This leads one to doubt the present authority of this case save on its own particular facts.

[M. D. L. WORSLEY, *Barrister-at-Law.*]

Quarter Sessions

The oath

On January 21, 1957, the Lord Chief Justice sitting in the Court of Criminal Appeal called attention to the new form of oath now in use at the Central Criminal Court and which would soon be in use on all the circuits. He said that jurors frequently found difficulty in reading the present form of oath, probably mainly due to the juxtaposition of the words " will well " in the phrase " will well and truly try." There was, he said, no statutory form of oath and any form might be used which sufficiently prescribed the obligation imposed. The Recorder of London had suggested the following form which had been approved by the judges: " I swear by Almighty God that I will faithfully try the several issues joined between Our Sovereign Lady the Queen and the prisoner at the bar and give a true verdict according to the evidence." The Lord Chief Justice added that, whilst there was no power to direct quarter sessions to adopt the new form, it was commended to their consideration as uniformity in these matters was desirable. [H. P.]

Magistrates' Courts

Maintenance orders

The Home Office has issued a Circular (No. 10/1957) dated January 15, 1957, which concerns the Maintenance Orders (Facilities for Enforcement) Act, 1920.

Summary Justice

Assault

Assault occasioning actual bodily harm. Man fired at wall twice and ricochet or chip of brickwork each time hit a neighbour; fined £50 on each of two charges, bound over in £100 to be of good behaviour for two years: Allen: Chertsey Magistrates' Court (*The Times*, January 24).

Aviation

Pilot of plane failing to ensure sufficient fuel was carried, incorrectly stating pay load, flying aircraft at an excess weight, failing to comply with usual flight rules and being in charge of an aircraft at night without making night take-offs and landings in the preceding ninety days; fined £30 for first offence and a total of £90 for the other offences, ordered to pay £1 costs; Davies: Solihull Magistrates' Court (*The Daily Telegraph*, January 23).

Owners of plane operating an overweighted plane, not producing duplicates of a load sheet and not keeping a record of the pilot's training; fined a total of £32, ordered to pay £17 costs;

Don Everall (Aviation), Ltd.: Solihull Magistrates' Court (*The Daily Telegraph*, January 23).

Firearms, explosives and offensive weapons

Firearms. Man, aged 23, walking along road with loaded air-pistol; fined £5 for being in possession of offensive weapon, £1 for carrying a gun without a licence; Collis: Derby Borough Magistrates' Court (*Derby Evening Telegraph*, January 2).

Food and drugs

Selling food not of quality demanded. One-inch nail in sultana scone; fined £10; Robinson's (Confectioners), Ltd.: West Bromwich Magistrates' Court (*Birmingham Mail*, January 21).

Fraud

Schoolteacher posing as doctor; fined £20; on a similar charge relating to another occasion given a conditional discharge; Skelton: Birmingham Magistrates' Court (*Birmingham Mail*, January 28).

Larceny

Medical forms. Labourer stealing eight medical forms from doctor's surgery, with which he submitted his own medical certificates to his employers; fined £3; Bolger: West Bromwich Magistrates' Court (*Birmingham Mail*, January 17).

Shoplifting. Three sisters acting together and stealing between them sixty-six articles worth £63 from store; each sentenced to two months' imprisonment; Clark, Hockley, Wood: Kingsdon Magistrates' Court (*The Daily Telegraph*, January 15).

Local government

Council. Member of council voting on a matter in which he had a pecuniary interest; fined £20, ordered to pay 5 guineas costs; Bradley: Rugby Magistrates' Court (*The Times*, January 16).

Petrol

Leaving vehicle carrying petrol unattended, carrying petrol in vehicle not built for the purpose and in unsuitable and unlabelled containers, insecurely fastened; storing 14½ gallons of petrol without a licence; fined £25 for first offences, £17 for last; petrol confiscated; Blake: Worcester Magistrates' Court (*Birmingham Mail*, January 28).

Keeping petrol on premises without a licence; fined £2, no order for confiscation of petrol; proceedings brought on grounds of public safety; Central Tanneries, Ltd.: Warrington Magistrates' Court (*Liverpool Echo*, January 10).

Storing 18 gallons of petrol in containers of more than two-gallon capacity; fined £20, ordered to pay 8 guineas, the cost of analysing the liquid although he had admitted to the police it was petrol; the petrol confiscated; Cave: Nottingham Magistrates' Court (*The Daily Telegraph*, January 12).

Railways and ships

Ships. Navigating ship without a pilot, refusing the services of a pilot and failing to display a pilot's signal; fined £70, ordered to pay £13 5s. costs; Stuiver: Gravesend Magistrates' Court (*The Daily Telegraph*, January 31).

Ships. Tank barge unlawfully discharging oil into the Thames; owners fined £200, ordered to pay 35 guineas costs; Cory Tank Lighterage, Ltd.: South-Western London Magistrates' Court (*The Times*, January 16).

Road traffic

Crossing road in contravention of a direction to stop given by a police constable, contrary to section 14 (1) of the Road Traffic Act, 1956. Fined 10s.; Major: Bootle Magistrates' Court (*Liverpool Echo*, January 11). Fined £1; Birchall: Bromborough Magistrates' Court (*Liverpool Echo*, January 28). Fined £2; Rose: Ealing Magistrates' Court (*Evening Standard*, January 15).

Riding a pedal cycle under the influence of drink; fined £10; Mylchreest: Liverpool Stipendiary Magistrates' Court (*Liverpool Echo*, January 15).

Sale and trade

Sunday. Serving detergents, flour, jelly and cornflower to customers on a Sunday contrary to the Shops Act, 1950; two previous convictions; fined £5; Palliser: Birkenhead Magistrates' Court (*Liverpool Echo*, January 23).

*Case and Comment**

British Commonwealth—*East Africa—jurisdiction of the Court of Appeal for East Africa*

Ross *v*. R.[1] (Judicial Committee of the Privy Council: Viscount Simonds, Lords Oaksey, Cohen and Keith of Avonholm: January 15, 1957) ([1956] 2 W.L.R. 307).

The appellant, who carried on a business in partnership, was convicted by the Supreme Court of Kenya of making false returns of income with intent to evade Kenya income tax and was sentenced to a year's imprisonment. The Court of Appeal for East Africa quashed the conviction and sentence, but ordered that the case be remitted to the Supreme Court for a new trial. On appeal to the Privy Council it was contended by the appellant that the Court of Appeal for East Africa had no jurisdiction to order a re-trial in a criminal case on appeal from Kenya.

Held, dismissing the appeal, that on the true construction of the East African Court of Appeal Order in Council, 1950 (S.I. No. 1968), by which the present Court of Appeal was established, the court had jurisdiction to make the order appealed from. [J. D. P.]

British Commonwealth—*Tanganyika.* See Mawji *v*. R., p. 185, below.

Children and Young Persons—*Abandonment—neglect—message from father to N.S.P.C.C. that children were alone*

R. *v*. Boulden[2] (Middlesex Quarter Sessions: Ewan Montagu Q.C., Chairman: January 15, 1957).

The prisoner was charged in ten counts under section 1 (1) of the Children and Young Persons Act, 1933, with abandoning and neglecting each of his five children, the eldest being a girl of nine years and the youngest a baby one year old. The prisoner had followed his wife to Glasgow where she had returned temporarily to her relatives. Before catching the train to Glasgow he had telephoned the N.S.P.C.C. informing them that his five children were alone in his house and that he was unable to return to them that night. When a woman police officer arrived at the house at about 10 p.m. the door was opened by the eldest child and the other four children were in bed. The only food in the house that was seen by the officer was two loaves, two pints of milk, some tomatoes, some macaroni, one egg and a packet of cereal. The prisoner gave evidence that he watched the arrival of the police officer from the other side of the street and that had he not seen her take the children away he would have returned to the house himself.

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* Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab), Barrister-at-Law.

[1] For the appellant: *John Foster, Q.C., Mark Littman* (instructed by Theodore Goddard & Co.). For the Crown: *B. MacKenna, Q.C., J. G. Le Quesne, D. C. Kennedy* (instructed by Charles Russell & Co.).

[2] For the prosecution: *J. S. R. Abdela* (instructed by Durham & Co. for the N.S.P.C.C.). For the defence: *Quintin Iwi* (instructed by Dale & Newbery).

The chairman directed the jury that concerning the five counts of abandonment the same considerations applied to all the children, and further that if they were satisfied that the prisoner had placed the children in the care of a welfare society before he could be said to have left them, there had been no abandonment. On neglect reference was made to the judgment of Lord Russell C.J. in *R.* v. *Senior* [1899] 1 Q.B. 283 at 291 where it was stated: " Neglect is the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind." The chairman stated that facts which might be adequate to constitute neglect of the younger children might not constitute neglect of the older children.

On the facts the jury found the prisoner guilty on all counts and he was sentenced to six months' imprisonment on each, the sentences to run concurrently.

[D. G. Valentine, *Barrister-at-Law*.]

COMMENTARY. In *R.* v. *Whibley* (1938) 26 Cr.App.R. 184 the Court of Criminal Appeal pointed out that section 1 is preceded by the words: " Part 1: Prevention of cruelty and exposure to moral and physical danger," and said that these words give some indication as to the suffering which the subsequent words were intended to cover. In that case the accused in a moment of passion walked out of a children's court leaving his five children there. His conviction for abandoning the children was quashed, Branson J. saying, " It does not appear to this court that it is right to say that, if the circumstances are such that the child might be a little frightened, or that some small mental suffering or anxiety might be caused the case is one which comes within section 1 of the Act."

Conspiracy—*Husband and wife.* See MAWJI *v.* R., p. 185, below.

Evidence—*Certificate of insurance.* See BORDERS *v.* SWIFT, p. 194, below.

Evidence—*Evidence of one co-defendant tending to incriminate another—justices preventing cross-examination*

RIGBY *v.* WOODWARD [3] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 16, 1957) (*The Times*, January 17, 1957).

R. and another were jointly charged with unlawful and malicious wounding, it being alleged that they had attacked an American airman and hit him with a bicycle chain. When the co-defendant gave evidence to the effect that R. had hit the complainant from behind, the justices, being of the opinion that they ought to exclude from their minds evidence of one co-defendant tending to incriminate another, refused to allow R.'s solicitor to cross-examine the co-defendant. They were also of the opinion that the evidence of the complainant was conclusive against R. whom they convicted, acquitting the co-defendant. On appeal by R. by case stated:—

Held, allowing the appeal, that the justices were wrong in stopping the cross-examination of the co-defendant who had given evidence against the appellant and which, if allowed, might have led to admissions by the co-defendant making it doubtful whether the appellant was the assailant. Although, normally, the case would have been brought before the court on an application for an order of certiorari, there was power under section 87 of the Magistrates' Courts Act, 1952, to question the justices' decision on the ground that it was wrong in law by applying to the justices to state a case. In the present case there was a radical departure from the well-known principles of justice and procedure and as the case could not be dealt with by sending it back for re-hearing, the conviction would be quashed. [J. D. P.]

COMMENTARY. Where justices convicted without giving the accused an opportunity to offer any defence the Divisional Court quashed the conviction by order of certiorari: *R.* v. *Wandsworth Justices, ex p. Read* [1942] 1 K.B. 281. The argument that certiorari was not open to the applicant because the remedy of appeal by a way of case stated was available was rejected, Viscount Caldecote C.J. saying, "It would be ludicrous in such a case as the present for the convicted person to ask for a case to be stated." The present case involved a similar denial of natural justice, and so the proper remedy was certiorari.

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[3] For the appellant: *H. B. Grant* (instructed by Martin & Nicholson for M. Owen Wellbelove, Reading). For the prosecutor: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co.).

Evidence—*Pollution of river.* See TRENT RIVER BOARD *v.* SIR THOMAS AND ARTHUR WARDLE, LTD., p. 196, below.

Husband and Wife—*Conspiracy—potentially polygamous marriage*

MAWJI *v.* R.[4] (Judicial Committee of the Privy Council: Lords Oaksey, Tucker, Cohen, Keith of Avonholm and Somervell of Harrow: January 15, 1957) (*The Times,* January 16, 1957).

The appellants were lawfully married in accordance with the rules of the Shia Mohammedans and were living together in a common matrimonial home under conditions in all respects similar to a monogamous union. On a charge of conspiring together to obstruct, prevent or defeat the course of justice, they were convicted by the resident magistrate at Dar-es-Salaam. The High Court of Tanganyika dismissed their appeal. On appeal to the Privy Council, the main question was whether the doctrine of English law, that a husband and wife could not be guilty of conspiring together was applicable in the circumstances.

Held, allowing the appeal, that although the marriages primarily contemplated by the rule in England were monogamous marriages, the rule being now part of the criminal law of Tanganyika it applied to any husband and wife of a marriage valid under Tanganyika law. [J. D. P.]

COMMENTARY. The rule that a husband and wife cannot be convicted of conspiring together is stated in the textbooks but there appears to be no case in which it has been applied by an English court. The reason for the rule seems to be the common law fiction that husband and wife are one person only with one will. See Glanville Williams, *The Criminal Law: The General Part,* § 158 and 10 *Modern Law Review* 20. It was not disputed in the present case that the rule is part of English law. Their Lordships expressed no opinion as to whether a similar alleged conspiracy would be indictable in England.

It has been held that a husband and wife and a third party (their daughter) can be convicted of conspiring together: *R.* v. *Whitehouse* (1852) 6 Cox 38. Could two wives of the polygamous marriage be convicted for conspiring together?

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[4] For the appellants: *Alan Grant* (instructed by Theodore Goddard & Co.). For the Crown: *James Stirling, Q.C., D. A. Grant* (instructed by Charles Russell & Co.).

Larceny—*Refuse in dustbin—property in*

WILLIAMS *v.* PHILLIPS [5] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 25, 1957) (*The Times*, January 26, 1957).

Dustmen were convicted by justices of stealing rags, wool and scrap metal taken from dustbins emptied by them in the course of their duties. The men had been warned by the corporation against appropriating refuse which was normally disposed of by the corporation to a dealer and the proceeds shared between the dustmen and the corporation. On appeal against their convictions the appellants contended that the refuse was not capable of being stolen.

Held, dismissing the appeal, that until refuse in a dustbin was taken away it remained the householder's property; once it was collected it became the property of the corporation and was in its constructive possession as soon as it was put in the dustcart; accordingly the appellants were rightly convicted of larceny. [J. D. P.]

COMMENTARY. Property which has been abandoned is incapable of being stolen because the taking of such property would not be " without the consent of the owner." 2 East P.C. 606–607. The fact, however, that a person evinces an intention never again to make use of a certain chattel does not mean that he has abandoned it for he may intend to exclude others from it: *R.* v. *Edwards* (1877) 13 Cox 384, where the accused was held properly convicted of larceny of three pigs which, after being bitten by a mad dog, had been shot by the prosecutor and buried three feet down. If the owner has abandoned the chattel but it has in the meantime come into the possession of another it may, of course, be stolen from that other: *Hibbert* v. *McKiernan* [1948] 2 K.B. 142 where the accused was held properly convicted of stealing golf balls from the secretary and members of the golf club on whose links the balls were lying, though the justices found that the balls had been abandoned by their owners.

Where a servant receives property from a third person for, or in the name or on account of his master he may be convicted of embezzlement but not of stealing the property from his master for it has never been in the master's possession; but if the servant should put the property in question into a chattel which is in his master's possession, *e.g.*, a till, a taking *animo furandi* thereafter will amount to larceny: *R.* v. *Reed* (1854) Dears. 257 and see " The Fraudulent Sub-Postmistress " [1955] Crim.L.R. 18. In the present case it would seem therefore that, even if it had been held that the householder had abandoned his property, the accused were properly convicted of larceny from the corporation. If the property had been taken before being put into the dustcart the proper charge would have been embezzlement.

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[5] For the appellants: *Henry Newman* (instructed by Capel Cure, Glynn Barton & Co. for R. H. Gould, Parr & Co., Bristol). For the respondent: *N. R. Blaker* (instructed by the Town Clerk, Bristol).

An argument that the accused had no *animus furandi* since they regarded the property taken as " perks " was rejected: " The test was whether the men were acting honestly. They knew perfectly well what their duty was and what they had to do with the refuse."

Magistrates' Court—*Appeal from.* See RIGBY *v.* WOODWARD, p. 184, above.

Mines and Quarries—*Coal mine—ventilation—fan stopped for maintenance purposes*

MCCARTHY *v.* LEWIS [6] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 23, 1957) (*The Times,* January 24, 1957).

The defendant, an under-manager of a colliery, who was performing the duties of a manager, gave instructions for the fan which was provided to ventilate the mine to be stopped at 1 p.m. on July 23, 1955, for the purpose of maintenance and restarted at 7 p.m. on the following day. On July 25 two workmen going towards the coal face were overcome by noxious gas and one of them died as a result. On an information under section 29 (1) of the Coal Mines Act, 1911, charging the defendant with failing to ensure that an adequate amount of ventilation was constantly produced, the justices found that the defendant had taken all reasonable means to prevent the contravention or non-compliance with the Act within the meaning of section 75, and dismissed the information. The prosecutor appealed.

Held, allowing the appeal, that there was no provision in section 29 allowing ventilation machinery to be stopped for maintenance except as the result of an accident. In the present case there had been a deliberate stoppage of ventilation and the defendant was in breach of his duty under the Act. [J. D. P.]

COMMENTARY. The Coal Mines Act, 1911, s. 29 (1) requires that " an adequate amount of ventilation shall be constantly produced . . ." It was held under the corresponding provision of an earlier Act that an offence was committed if the ventilating machinery was switched off at week-ends when the miners were not at work: " So long . . . as a colliery is being worked, with but temporary intervals of cessation, as, for rest at night, or on a Sunday, the statute requires adequate and constant ventilation to be kept up in it": *Knowles* v. *Dickinson* (1860) 2 E. & E. 705.

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[6] For the prosecutor: *Edmund Davies, Q.C., Rodger Winn* (instructed by the Treasury Solicitor). For the defendant: *Geoffrey Veale, Q.C., R. Withers Payne* (instructed by C. M. H. Glover, Doncaster).

Murder—*Attempt to commit suicide—killing another in the course of that attempt*

R. *v.* SPENCE [7] (Court of Criminal Appeal: Lord Goddard C.J., Cassels and Lynskey JJ.: January 21, 1957) (*The Times,* January 22, 1957).

S. was convicted at assizes of murder. The deceased was a woman with whom S. had some kind of illicit relationship and she died from stab wounds in the heart. The defence put forward at the trial was that S. did not intend to do harm to the deceased but intended to stab himself. On appeal to the Court of Criminal Appeal:—

Held, dismissing the appeal, that if A. intending to kill himself, in the course of that attempt killed another, it was quite clear in law that that was murder. There was ample authority to support that proposition, one such case being *R.* v. *Hopwood* (1913) 8 Cr. App.R. 143. The learned judge gave a perfectly proper direction to the jury when he said that if the deceased was struck by the knife which S. was at that moment using for the purpose of taking his own life, then S. was engaged in the felony of self-murder and the killing, although S. may not have intended to kill the deceased at all, was in those circumstances murder. Quite apart from this aspect, there was some evidence before the jury that there was a wilful killing of the deceased. There was, therefore, no ground for interfering with the conviction. [H. P.]

COMMENTARY. The rule laid down is well established. Suicide is regarded at common law as self-murder but an attempt to commit suicide is only a misdemeanour and not the felony of attempt to murder within the meaning of section 15 of the Offences against the Person Act, 1861: *R.* v. *Burgess* j1862) 9 Cox 247; *R.* v. *Mann* (1914) 10 Cr.App.R. 31.

In *R.* v. *French* [1956] Crim.L.R. 129 the Lord Chief Justice, in reducing a sentence for attempted suicide from two years' to one month's imprisonment said that " to say that suicide was to be regarded as a very serious crime indeed showed a lack of proportion; it was not a very serious crime" (*The Times*, December 13, 1955). It is a truly remarkable state of affairs when an intention to commit a "not very serious crime" is regarded as a sufficient *mens rea* for murder. There would seem to be a case for some reform here. The Homicide Bill proposes that a killing done in pursuance of a genuine suicide pact should be manslaughter, not murder.

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[7] For the appellant: *Peter Rawlinson* (instructed by the Registrar Court of Criminal Appeal). For the Crown: *R. E. Seaton, J. Mervyn Griffith-Jones* (instructed by the Director of Public Prosecutions).

Murder—*Joint trial.* See R. *v.* ARMSTRONG, p. 198, below.

Restitution of Property—*Failure of charge of demanding money with menaces—claim for money held by police*

DUKE AND GATWARD *v.* THE POLICE [8] (Bow Street Magistrates' Court: J. F. Marnan, Q.C., Metropolitan Magistrate: October 3, 5, 1956).

Both plaintiffs had taken out summonses under the Police (Property) Act, 1897, claiming £200 held by the police. Gatward was the managing director of a company which supplied goods to chain stores. There were certain irregularities in the invoicing of the goods, which Duke brought to the notice of the chain stores. Duke later told Gatward he had further information but said he would be prepared to withhold it if Gatward paid him £200 for doing so. Gatward informed the police, contending that there was an attempt to blackmail him. The police advised him to pay Duke, which Gatward did, the numbers of the notes being recorded. The money was handed over by Gatward's agent and at the same time an agreement was drawn up between the two parties to the effect that the transaction was "a business transaction, under no way is the money extorted under threats." Duke was later charged with demanding money with menaces from Gatward, but was acquitted. Both men claimed the £200 from the police.

Held, that the agreement was not a contract. Gatward never had any intention to contract and never intended to authorise the transfer of the property in the money. If the agreement was a contract it was invalid because the consideration was illegal since the information had been obtained by Duke during the course of his employment by Gatward; alternatively, there was no consideration since Duke had admitted that he had no fresh information, other than that already given to the chain stores. There was no legal basis for the passing of the property and accordingly Gatward was the apparent owner and the money should be paid to him.

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[8] For the first plaintiff: *J. Lloyd-Eley* (instructed by J. M. Morris & Co.). For the second plaintiff: *F. H. Lawton* (instructed by Wedlake, Saint & Co.).

[A. Burt.]

COMMENTARY. Where any property has come into the possession of the police in connection with any criminal charge a court of summary jurisdiction may, under the Police (Property) Act, 1897, make an order for the delivery of the property to the person appearing to be the owner. It seems that a person with an immediate right to possession is entitled to succeed as against the " owner " in the strict sense: *Marsh* v. *Commissioner of Police* [1945] K.B. 43, where an innkeeper who had a lien on a stolen ring was held entitled to an order for delivery as against the owner.

Money paid under an illegal contract is generally irrecoverable, but it is not clear that this was, strictly, an illegal contract. Even if it were, however, Gatward may still have been entitled to recover; for where the parties are not *in pari delicto* the less guilty party is entitled to succeed. Where there is a total failure of consideration money paid may be recovered.

Road Traffic—*" C " licence—carrying goods for hire and reward —meaning of " subjected to a process or treatment "*

CARPENTER *v*. W. LUSTY & SONS, LTD.[9] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 16, 1957.)

L. Co., who carried on business as export packers and shippers' forwarding agents and were holders of a " C " licence in respect of a motor-vehicle, used the vehicle to deliver 36 bales of clothing and 11 chests of shoes to Fennings Wharf. They were summoned for failing to comply with the conditions of the licence in that they carried the goods for hire or reward contrary to section 9 of the Road and Rail Traffic Act, 1933. The goods were the property of D. Ltd. on whose behalf they were carried, and who had paid to L. Co. a sum in respect of the goods which included a separate charge for cartage. L. Co. had compressed the clothes by a power press and sealed them in bales and the shoes had been put into chests, secured with steel hoops, and stencilled. The prosecution contended before the magistrate that the goods could not be said to have been subjected to a process or treatment unless there had been some change in their nature and that the delivery did not fall within the exception created by section 1 (5) (*b*) of the Act of 1933. The magistrates, being of opinion that the delivery came within the exception created by section 1 (5) (*b*) of the Act dismissed the summons, holding that no offence had been committed. On appeal by the prosecutor to the Divisional Court:—

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[9] For the prosecutor: *Rodger Winn* (instructed by the Treasury Solicitor). For the respondent: *M. A. B. King-Hamilton, Q.C., James Amphlett* (instructed by Amphlett & Co.).

Held, that the magistrate had rightly held that L. Co. had subjected the goods to a process or treatment in accordance with the business carried on by them; that they had used the vehicle for the collection of such goods and that what they had done in delivering the goods to the wharf did not constitute carrying the goods for hire or reward. The words of section 2 (4) of the Act of 1933 under which a " C " licence was granted could not cut down the freedom given by the earlier part of the Act.

[Mrs. E. M. Wellwood, *Barrister-at-Law.*]

COMMENTARY. Under section 2 (4) of the Road and Rail Traffic Act, 1933, a private carrier's or " C " licence entitles the holder to use the authorised vehicle for the carriage of goods for or in connection with any trade or business carried on by him, but subject to the condition that the vehicle shall not be used for the carriage of goods for hire or reward. But, by section 1 (5) (*b*), the delivery or collection of goods which have been or are to be subjected to a process or treatment in the course of a trade or business is not a carriage for hire or reward.

Road Traffic—*Causing death by dangerous driving of motor-vehicles—direction to jury*

R. *v.* CURPHEY [10] (Bedfordshire Assizes: Finnemore J.: January 18, 1957).

The prisoner was indicted under section 8 (1) of the Road Traffic Act, 1956, with having caused the death of a motor-cyclist by the dangerous driving of a motor-car. The prisoner driving when visibility was restricted to about 60 yards through fog, on a bend on a usually busy road marked by a continuous white line, pulled out to pass one of at least two vehicles in front of him. When overtaking his speed was between 30 and 35 miles an hour, which the prosecution did not suggest was in the circumstances excessive. Before the prisoner could fully regain his nearside, a motor-cyclist came round the bend in the opposite direction, and collided with him with great force. The motor-cyclist was flung through the air for a distance of several yards, and died as a result of his injuries. Witnesses differed as to the prisoner's position on the road as he was overtaking. The witnesses for the prosecution stated that the motor-cyclist was on his correct side of the road, but near the centre of it, about two feet from the white line. He was wearing a crash helmet, and was looking down on the road, and not ahead of him. Evidence was also given that after the collision the speedometer on the motor-cycle was found to be jammed, and recording a speed of 40 miles per hour. It was submitted by counsel for the defence first, that the accused was not guilty of dangerous driving, but at the highest only careless driving, and secondly, that if he were guilty of dangerous driving he did not thereby cause the death of the motor-cyclist. The motor-cyclist was responsible for his own death, inasmuch as he was travelling at an excessive speed, and not keeping a proper lookout.

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[10] For the prosecution: *J. Malcolm Milne* (instructed by the Director of Public Prosecutions). For the defendant: *T. H. K. Berry* (instructed by Poole & Co., Bedford).

Finnemore J., directed the jury that they must be satisfied, first that the prisoner was doing a dangerous thing in driving as he did in the circumstances prevailing at the time, and secondly, if they were satisfied that he was driving dangerously, that he caused the death of the motor-cyclist thereby. If they were satisfied that he was driving dangerously but were not satisfied that he caused the death of the motor-cyclist thereby, they were entitled to return a verdict of dangerous driving under section 8 (4) of the Road Traffic Act, 1956.

After retiring the jury came back with a request for further directions. They stated that they were satisfied that the prisoner was driving dangerously, but wished to know of what they had to be satisfied in order to find that he caused the death of the motor-cyclist. After conferring with counsel as to what was the proper direction, Finnemore J. directed the jury that they must be satisfied that the dangerous driving was the substantial, although it need not have been the sole cause of the motor-cyclist's death. The jury then stated that they were unanimous that the prisoner's dangerous driving did not cause the death of the motor-cyclist in the terms of that direction, and returned the alternative verdict of dangerous driving. The prisoner was fined £50, and disqualified for five years.

[J. P. Culpin, *Solicitor*.]

COMMENTARY. The crime of causing death by reckless or dangerous driving was created because of the well-known reluctance of juries to convict motorists of manslaughter. The present case seems to indicate that juries may be little less reluctant to convict of the new crime. On the reported facts it is difficult to see how it could properly be held that the dangerous driving was not a substantial cause of the motor-cyclist's death.

An obvious case for the application of section 8 (4) would be where the accused was driving negligently but the circumstances were such that, even if he had been exercising all proper care, he would not have been able to prevent the death occurring. *Cf. R.* v. *Dalloway* (1847) 2 Cox 273. The facts in the present case could hardly be said to come within that principle.

Road Traffic—*Dual-purpose vehicle—Land Rover*

KIDSON *v.* SWATRIDGE [11] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 22, 1957) (*The Times*, January 23, 1957).

An information was preferred against the defendant charging him with driving a Land Rover at a speed greater than 30 miles an hour, contrary to section 10 of the Road Traffic Act, 1930, as amended by section 2 of the Road Traffic Act, 1934. The justices found that at the time of the alleged offence, the vehicle was carrying one passenger beside the driver, but was otherwise unladen. The vehicle was so constructed that the driving power of the engine could be transmitted to all four wheels of the vehicle, and its unladen weight did not exceed two tons. The cab of the vehicle was closed and the rear portion, which was separated from the cab by a partition was not constructed for the carriage of passengers. The vehicle was licensed as a private vehicle. The defendant contended that it was a dual-purpose vehicle as defined in the Motor Vehicles (Variation of Speed Limit) Regulations, 1955 (S.I. No. 1880; [1956] Crim.L.R. 137) and that as it was not carrying goods it was not subject to the goods vehicle speed limit, but to the same speeds as an ordinary private car. The justices were of opinion that there was no room in the cab for the carriage of goods and that the rear part of the vehicle was constructed for the carriage of goods, but had no passenger seats constructed therein, was not accessible from the cab, and was not covered in and that, therefore, the vehicle was not as a whole constructed or adapted for the carriage of both passengers and goods and was not a dual-purpose vehicle. The defendant was convicted and appealed.

Held, allowing the appeal, that the justices having found that the driving power of the engine could be transmitted to all four wheels of the vehicle and that it could carry both passengers and goods, the vehicle was a dual-purpose vehicle within the meaning of the regulations and, therefore, at the material time its speed was not limited to 30 miles an hour. [J. D. P.]

COMMENTARY. If it is so made that the driving power is transmitted to all its wheels then a vehicle which is constructed or adapted for the carriage of both passengers and goods is a "dual-purpose vehicle" even though it does not comply with the conditions as to construction specified in the Schedule to the Regulations. If the driving power is not transmitted to all the wheels then the vehicle is not a "dual-purpose vehicle" unless it complies with those conditions.

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[11] For the defendant: *Norman Skelhorn, Q.C., Raymond Stock* (instructed by A. J. A. Hanhart for Humphries, Kirk & Miller, Swanage).

Road Traffic—*Insurance—evidence—production of policy*

Borders *v.* Swift[12] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 22, 1957).

On May 16, 1956, the defendant, who was the proprietor of a car-hire business, used a motor-car in the city of Salford for the purpose of plying for hire, but not for plying for hire from a public stand or railway station. Such use of the car was contrary to the provisions of the Salford Improvement Act, 1862, in that no licence to ply for hire had been granted by the Salford Corporation. The defendant was the holder of a certificate of insurance within the meaning of Part II of the Road Traffic Act, 1930, which limited the use of the car to the carriage of passengers or goods in connection with the policy holder's business and stated that the policy did not cover use for plying for hire from public stands or railway stations. On an information against the defendant charging him with using the car without there being in force a policy in respect of third party risks, contrary to section 35 of the Act of 1930, it was contended by the prosecutor that to determine what was the policy holder's business as referred to in the certificate there should be made available to the court the policy of insurance. The justices were of opinion that the provisions of the certificate were clear and unambiguous and that no further proof of the contents of the policy was required; that the certificate proved that, at the material time, there was a policy in respect of third party risks and, accordingly, they dismissed the information. The prosecutor appealed. In the Divisional Court counsel for the prosecutor relied on *Edwards* v. *Griffiths* [1953] 1 W.L.R. 1199, in support of his contention that the policy should be produced. It was also argued that, on the authority of *Hunt* v. *Morgan* [1949] 1 K.B. 233, a person cannot ply for hire except from public stands or railway stations.

Held, dismissing the appeal, (1) that if the justices were satisfied that, for the purpose of the case before them, they could obtain all the information they required from the certificate of insurance they need not ask for the policy, although in most cases it is desirable that the actual policy should be seen. (2) That a person could ply for hire at places other than a public stand or railway station and, accordingly, the justices came to a right decision.

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[12] For the prosecution: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co., for R. Ribblesdale Thornton, Salford). For the defendant: *G. C. H. Spafford* (instructed by Manches & Co., for J. H. Franks, Manchester).

Per Lord Goddard C.J. To say that for the purposes of an insurance policy a man is not plying for hire if he is driving his vehicle down the street and inviting people to hire him seems to me impossible. *Hunt* v. *Morgan* deals with a particular matter under a particular Act. We never intended to say in that case that you cannot ply for hire for the purpose of the particular section under consideration except on a stand or being stationary in a street. [J. D. P.]

COMMENTARY. An offence is committed against section 35 only if there is no policy of insurance in force in relation to the user of the vehicle which is in question. Whether the insurers are on risk is a question of construction of the policy, not of the certificate. The policy itself is therefore the best evidence on the issue of whether a particular user of the vehicle is covered.

As between assured and insurers the policy would have to be construed against the insurers and therefore, if there is any ambiguity it will be resolved in favour of the assured even though the insurers are not before the court: *Edwards* v. *Griffiths* [1953] 1 W.L.R. 1199. In the present case, however, the certificate seems to have been unambiguous and in favour of the assured.

Road Traffic—*Meaning of "road"—yard*

HEATH *v.* PEARSON [13] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 16, 1957).

During the hours of darkness P. left a motor-car without lights in a place called Brunswick Yard, Huddersfield. Brunswick Yard was an unpaved yard or court adjoining a beerhouse and was not a thoroughfare, being completely enclosed except for an entrance, wide enough to allow the passage of motor-vehicles, from Albert Street, a public highway. There were ten small cottages in the yard, each with its only door giving access to the yard and there was also a back entrance to the beerhouse for the private use of the licensee (the father of P., who resided in the beerhouse) and his family which was not used by members of the public. The yard was used by residents and persons who called upon them and by vehicles for the purpose of collecting refuse from dustbins. P. was charged under section 1 of the Road Transport Lighting

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[13] For the prosecution: *J. A. Cotton* (instructed by Sharpe, Pritchard & Co., for H. Bann, Huddersfield). The defendant did not appear and was not represented.

Act, 1927, with causing a motor-vehicle to be on a road during the hours of darkness without lights. The justices were of the opinion that the yard was not a road in the ordinary sense, that the user of the place by residents and callers and the periodical user by the refuse collecting vehicle did not constitute habitual user by the general public, and, having regard to *Thomas* v. *Dando* [1951] 2 K.B. 620, that the yard was not a road within the meaning of the Act. The prosecutor appealed.

Held, dismissing the appeal, that although Brunswick Yard might well be a place to which the public had access, that was not enough to bring it within the definition of "road" in the Act for it also had to be a road; the justices had found that Brunswick Yard was not a road and, since the question whether or not a place was a road was primarily a question of fact, the court had no right, even if they had not agreed with it, to interfere with the justices' decision.

[Miss J. F. Lamb, *Barrister-at-Law.*]

COMMENTARY. Under the Road Transport Lighting Act, 1927, the expression "road" means any public highway and any other road to which the public has access. In *Bugge* v. *Taylor* [1941] 1 K.B. 198 the Divisional Court held that where the public were in the habit of walking and driving over the forecourt of an hotel which was in no way separated from the road there was evidence on which the justices could find that the forecourt was a road. In *Thomas* v. *Dando* [1951] 2 K.B. 620 the Divisional Court held that a forecourt, which the public were in the habit of using for the purpose only of access to the defendant's shop and that adjoining it, could not possibly be said to be a road.

Road Traffic—*Plying for hire.* See BORDERS *v.* SWIFT, p. 194, above.

Salmon and Freshwater Fisheries—*Pollution—evidence*

TRENT RIVER BOARD *v.* SIR THOMAS AND ARTHUR WARDLE, LTD.[14] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 17, 1957) (*The Times,* January 18, 1957).

The defendants, who were dyers and chemical manufacturers, had a sodium store as part of their works. The store was surrounded by a yard which was drained by means of a pipe into a dyke, a tributary of the river Churnet. On April 8, 1956, a number of dead trout and other fish were found in the river below the defendants' works. On that day liquid was being discharged from the works into the dyke. A water bailiff employed by the river board took a sample of liquid as it fell from the pipe, but the requirements of section 15 (2) of the River Boards Act, 1948, were not complied with. On an information by the river board under section 8 (1) of the Salmon and Freshwater Fisheries Act, 1923, it was contended by the board that they were entitled to call the evidence of a qualified biologist as to the effect on a fish of putting it into water containing part of the sample. The justices refused to allow such evidence and dismissed the information. On appeal by the river board:—

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[14] For the river board: *G. D. Squibb, Q.C., Nigel Robinson* (instructed by Kingsford, Dorman & Co., for John Hirst, Nottingham). For the defendants: *J. E. S. Simon, Q.C., J. W. Da Cunha* (instructed by Cunliffe & Mossman for Knight & Sons, Newcastle-under-Lyme).

Held, allowing the appeal, the water bailiff had not made an analysis within the meaning of section 15 (2) of the Act of 1948 and accordingly there was no reason why the evidence should not be admitted. The case should go back to the justices.

Quaere whether section 15 (2) applied to prevent the giving of evidence of the result of the chemical analysis of the sample. [J. D. P.]

COMMENTARY. Under section 15 (2) the result of an analysis is admissible in evidence only if the person taking the sample has delivered one part to the occupier of the land, retained one part and submitted one part to the analyst. The experiment carried out by the biologist in this case was not an analysis and, therefore, not subject to the conditions specified in section 15 (2).

Salmon and Freshwater Fisheries—*Sale of salmon during close season—fish caught during close season for sale after it*

BIRKETT *v.* MCGLASSONS LTD.[15] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 16, 1957) (*The Times,* January 17, 1957).

Between January 16 and 26, 1956, twenty-one salmon were lawfully caught in the river Eden by rod and line. The fish were deposited with the defendant fishmongers on terms that if the fishermen did not require them to return the fish before February 1 the fishmongers were at liberty to dispose of the fish by way of sale as agents for the fishermen. At 8.30 on January 31, the fish were consigned to London for sale on an agency basis. The authority of the fishermen was not first obtained. The fish arrived in London on February 1, when they were intercepted and sold by the Fishmongers' Company who held the proceeds pending some order of the court. On an information against the defendants of having the salmon in their possession for sale on January 31, contrary to section 30 of the Salmon and Freshwater Fisheries Act, 1923, the justices found that the fish were never in the defendants' possession to be sold between August 31, 1955, and February 1, 1956; alternatively, they were satisfied that the defendants only had the fish in their possession for sale as from the closing of their premises on January 31 until midnight of that day. Accordingly, they dismissed the information. The prosecutor appealed.

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[15] For the prosecutor: *Gilbert Paull, Q.C., J. G. Shorrock* (instructed by Boxall & Boxall, for Oglethorpe & Hough, Keswick). For the defendants: *Maurice Jones* (instructed by Charles Russell & Co., for Harston & Atkinson, Carlisle).

Held, dismissing the appeal, that section 30 was concerned only with sales which took place or were intended to take place before February 1 during the close season, and as the defendants had no power of sale until February 1, they were not guilty of an offence against the section. [J. D. P.]

Suicide—*Killing another in attempt to commit suicide.* See R. *v.* SPENCE, p. 188, above.

Trial—*Joint trial—murder—judge's discretion*

R. *v.* ARMSTRONG [16] (Court of Criminal Appeal: Lord Goddard C.J., Cassels and Lynskey JJ.: January 21, 1957) (*The Times,* January 22, 1957).

A. was indicted together with his wife at assizes for the murder of his five months old child by poisoning. A. was convicted and his wife was acquitted. The evidence at the trial was that A., who was a sick bay steward at a Naval hospital, introduced a drug known as seconal into the house and that the child died from seconal poisoning. On appeal to the Court of Criminal Appeal it was contended on behalf of A. that the judge ought to have ordered separate trials because the evidence given by the wife was so prejudicial to A. that this court ought to interfere. It was further contended that evidence as to the death of another child (of bronchial pneumonia) at an earlier date which was elicited in cross-examination of A. was prejudicial to his case in that it suggested system.

Held, dismissing the appeal, that in *R.* v. *Grondkowski* (1946) 31 Cr.App. R. 116, after a review of all the cases, this court had decided that the question of joint or separate trials was a matter of discretion for the judge. It was difficult to see how in the present case there could have been other than a joint trial, and it seemed that it was at least as favourable to A. that he should be tried with his wife as separately. There was evidence against both A. and his wife, and the trial judge was meticulously careful in directing the jury that if they were not satisfied that the defendants were acting in concert then they would have to decide against each of them separately. The learned judge exercised his discretion perfectly rightly in ordering a joint trial. As to the other matter raised, the only reason why reference was made to the death of the other child was to show that A. and his wife were not two inexperienced young people faced for the first time in their lives with an ailing child. The learned judge was careful to point out to the jury that there was nothing sinister about the death of the earlier child who died of bronchial pneumonia. The questions asked in cross-examination on this point were perfectly unexceptionable and admissible. In the circumstances, the appeal would be dismissed. [H. P.]

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[16] For the appellant: *Malcolm Wright, Q.C., Dudley Collard* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. T. Molony, Q.C., A. H. Bray* (instructed by the Director of Public Prosecutions).

COMMENTARY. If the appellant and his wife had been tried separately the wife could have been called as a witness at the appellant's trial only for the defence and upon his application. At the joint trial the wife was, of course, incompetent to give evidence for the prosecution, but had a right to give evidence in her own defence, irrespective of the wishes of the appellant, and in exculpating herself she inculpated him. From this point of view the joint trial was disadvantageous to the appellant.

Acts and Orders[*]

Approved Schools

Pensions: see p. 201, below.

Armed Forces

VISITING FORCES (UNION OF SOUTH AFRICA DEFENCE FORCES) (AMENDMENT) ORDER, 1956 (S.I. No. 2044); VISITING FORCES (ROYAL NEW ZEALAND AIR FORCE) (AMENDMENT) ORDER, 1956 (S.I. No. 2045): both operative January 1, 1957. The original Orders (S.I. 1945, No. 617 and 1940, No. 2199) are amended so as to substitute appropriate references to the Air Force Act, 1955, for references to the Air Force Act.

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[*] Prepared by F. Maurice Drake, Barrister-at-Law.

Visiting Forces (Designation) Order, 1956 (S.I. No. 2041): operative January 1, 1957. Luxembourg, Turkey, Greece, Denmark, Portugal and Italy are designated countries to which the provisions of section 1 (1) of the Visiting Forces Act, 1952, applies.

Visiting Forces (Military Courts-Martial) (Amendment) Order, 1956 (S.I. No. 2043): operative January 1, 1957. Ceylon Forces are included amongst the Commonwealth Forces referred to in the Visiting Forces (Military Courts-Martial) Order, 1942 (S.R. & O. No. 270). The original Order is also amended by substituting references to the Army Act, 1955, for references to the Army Act.

Visiting Forces (Application of Law) Order, 1956 (S.I. No. 2042): operative January 1, 1957. The Visiting Forces (Application of Law) Order, 1954 (S.I. No. 635; [1954] Crim.L.R. 558) is amended so as to make alterations with regard to the application of enactments to visiting forces in consequence of the repeal of certain enactments, of the replacement of certain other enactments (in particular the Army and Air Force Acts) by fresh legislation, and of other changes in the law since the Order of 1954 was made. In addition to this, Luxembourg, Turkey, Greece, Denmark, Portugal and Italy are added as countries to whose visiting forces the Order of 1954 is to apply.

Customs and Excise

Export of Goods (Control) (Amendment No. 2) Order, 1957 (S.I. No. 39): operative January 21, 1957. The Order of 1956 (S.I. No. 1702; [1957] Crim.L.R. 64) is amended. Licences are required for the export to all destinations of sectional material of iron and steel or of alloys of iron and steel, rails of all kinds and pig iron.

For penalties for contraventions, see section 3 of the Import, Export and Customs Powers (Defence) Act, 1939.

Food and Drugs

Milk and Dairies (Scotland) Amendment Order, 1956 (S.I. No. 2110): operative January 8, 1957. Article 13 of the Milk and Dairies (Scotland) Order, 1934 (S.R. & O. No. 675) is revoked. Article 13 required that every vessel containing milk intended for sale for human consumption should, unless the vessel was a bottle properly closed or capped, before being delivered to any common carrier or other person in transit, be sealed by means of a leaden seal or locked.

London

The following Orders have been made detailing prescribed routes: S.I. 1957, Nos. 79 (Croydon); 90 (Deptford); 91 (Paddington).

The following Order has been made respecting unilateral waiting: S.I. 1957, No. 93 (Kensington).

The following Order has been made prohibiting cycling on prescribed footpaths: S.I. 1957, No. 92 (Swanscombe).

Magistrates' Courts

The following Order has been made altering petty sessional divisions: S.I. 1957, No. 32 (West Suffolk).

Pensions: see below.

Ministers of the Crown

MINISTER OF FUEL AND POWER (CHANGE OF STYLE AND TITLE) ORDER, 1957 (S.I. No. 48): operative January 16, 1957. The style and title of the Minister of Fuel and Power is changed to "the Minister of Power," and the new style and title is substituted for the former in all enactments, instruments, contracts and legal proceedings made or commenced before the operative date.

Transfer of functions: see p. 202, below.

Pensions

PENSIONS (INCREASE) ACT (EXTENSION) ORDER, 1956 (S.I. No. 2046): operative December 26, 1956. In its application to England and Wales, the benefits of the Pensions (Increase) Act, 1956 ([1956] Crim.L.R. 500) are extended to certain pensions paid by local authorities in respect of service as a person employed by a magistrates' courts committee to assist a justices' clerk, as a member of the staff of an approved probation home or hostel, and as a probation officer or a clerk appointed to assist a probation officer. It is further provided that the benefits of the Pensions (Increase) Acts, 1944, 1952 and 1956, shall be extended to a pension paid by a local authority in respect of service on the staff of an approved school, and by the Surrey County Council in respect of service as a whole-time officer transferred to or appointed by the court of quarter sessions for the county of Surrey under the provisions of the Surrey County Council Act, 1936.

In its application to Scotland, the Order provides that the benefits of the Pensions (Increase) Acts, 1944, 1952 and 1956, shall be extended to a pension paid by a local authority in respect of service on the staff of an approved school.

POLICE PENSIONS (SCOTLAND) (NO. 3) REGULATIONS, 1956 (S.I. No. 2111): operative January 1, 1957. Amendments are made in relation to widows' pensions and children's allowances.

Police

Pensions: see above.

Probation

Probation officers' pensions: see p. 201, above.

Road Traffic

ROAD TRAFFIC ACT, 1956 (COMMENCEMENT NO. 3) ORDER, 1957 (S.I. No. 3): operative January 1, 1957. The following provisions of the Road Traffic Act, 1956 ([1956] Crim.L.R. 608, 673 and 758) came into operation on March 1, 1957:

s. 35 (traffic signs);
s. 37 (power of police to erect traffic signs relating to special traffic regulations);
s. 38 (temporary traffic signs);
Sched. 9 in part (repeals).

The following provisions of the Act come into operation on April 1, 1957:

s. 36 and Sched. 5 (experimental traffic schemes in London).

Scotland

Food and drugs: see p. 200, above.
Pensions: see p. 202, above.

Trade and Industry

TRANSFER OF FUNCTIONS (IRON AND STEEL) ORDER, 1957 (S.I. No. 95): operative January 25, 1957. A number of functions of the Board of Trade relating to iron and steel are transferred to the Minister of Power. They include functions under the Iron and Steel Act, 1953, and under regulation 55AB of the Defence (General) Regulations, 1939 (price control of goods and services).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

25. *The meaning of "one distribution of prizes" in section* 4 (1) (*b*) *of the Small Lotteries and Gaming Act,* 1956

Section 4 (1) (*b*) of the Small Lotteries and Gaming Act, 1956, authorises the holding of small gaming parties provided that "not more than one distribution of prizes or awards is made in respect of all games played at the entertainment, etc., etc."

My query is in respect of the game "Housey Housey." It appears that certain institutions have been given advice that if they play "Housey Housey" by charging all the players one overall admission fee, *e.g.*, 5s. for ten "houses," and then at the conclusion of the play, give out the prizes to the winner of each house, that they will be complying with the terms of section 4 (1) (*a*) and (*b*) of the Act.

Whilst it seems that the charge of one admission fee will comply with section 4 (1) (*a*), I am not so happy about the distribution of prizes in this manner complying with section 4 (1) (*b*).

It seems to me that the view may well be taken that if ten separate "houses" are played and a winner for each "house" decided, handing him his winnings at the conclusion of playing all the "houses" may not necessarily be "one distribution of prizes." As I see it, it could well be said that giving a prize for each separate "house" could be regarded as a distribution of prizes for each separate "house," and that delaying the actual handing over of the prize to the winning player until the end of play, would be merely a subterfuge to get around the conditions of the Act. In fact what I am suggesting is that giving separate prizes for say ten separate "houses" at the conclusion of play, could be regarded as ten separate distributions taking place simultaneously.

Would I be right in suggesting that the purpose of the Act was to ensure that the winners of prizes should be decided having regard to all the games played at a particular entertainment, not in relation to individual sections of play? I have in mind, for example, a progressive whist drive where the winner can only be decided in the light of the total results of the play for all hands played during the drive.

I should be grateful for your advice as to whether you think that the delaying of the issue of prizes in " Housey Housey " until all play is completed, although in actual fact a separate prize is given for each " house," would be within the terms of the statute.

[J. W.]

Answer

Subsection (1) of section 4 of the Small Lotteries and Gaming Act, 1956, lists the four conditions which, if they are complied with, render games of chance, or of chance and skill combined, lawful. The two conditions relevant to the question are paragraphs lettered (*a*) and (*b*) of the above subsection, and they deal respectively with payment and with prize distribution.

We agree with the correspondent that the charging of an overall admission fee to each player in a " Housey-Housey " session satisfies section 4 (1) (*a*); but we cannot agree that giving separate prizes for the separate " houses " at the conclusion of the whole session is contrary to section 4 (1) (*b*). We do not see how this can properly be regarded as being separate distributions taking place simultaneously. Admittedly, it is purely a question of the meaning to be placed on the phrase " one distribution of prizes," and it is not easy to answer this question without any authoritative decision to guide one. One interpretation may well be as good as another, until the matter has been decided in the courts. But we feel nevertheless that, where there is a doubt of this sort, it is safest to choose the simplest and most straightforward meaning, and to reject a complex meaning involving a technical or abstruse approach. In other words, we think that the phrase " one distribution of prizes " means, simply, one occasion or ceremony at which any prizes won during the session are handed out to the various winners, rather than a distribution of prizes based necessarily upon a cumulative system of earning them.

Some games, of course, offer no difficulty where, by their very nature, they demand a cumulative method of determining the prize winner—progressive whist, as suggested by the correspondent, is a good example. But with other non-cumulative games, such as " Housey-Housey," whose winners are, by the nature of the game, ascertainable at the end of each stage, the phrase " one distribution of prizes " would surely have no meaning at all if one were to exclude the simple meaning favoured above, of a single ceremony of distributing all the separately won prizes. [N. W.]

26. *Jurisdiction in proceedings for failure of child to attend school*

An application will probably be made shortly to me for a summons to be issued under the following circumstances: a child who resides with her parents in county A, attends school in county B and has been playing truant. The county council for county A will probably want to commence proceedings under the Education Act, 1944, s. 40, against the parents of this child in the petty sessional division in county A in which the child resides. I should like to know whether proceedings can be taken in county A. I am inclined to the view that the offence takes place in county B, where the school is which the child fails to attend. [M. P. W.]

ANSWER

Section 40 prescribes the penalties and possible consequences of a contravention of either section 37 or section 39 of the Act. Under section 37 the offence is failing to comply with the requirements of a school attendance order; under section 39 the offence arises from the failure of a child to attend regularly at the school at which he is a registered pupil. As a school attendance order must name a particular school, it appears clear that in both cases the offence can only be related to the school and not to the home of the child. Jurisdiction therefore lies with the justices for county B, in which is situated the school at which the failure to attend occurs. Only if the school is within 500 yards of the boundary between counties A and B would the justices for county A have concurrent jurisdiction (see section 3 (1) of the Magistrates' Courts Act, 1952).

It should be noted that section 40 (2) casts the duty to institute proceedings (a) in the case of offences against section 37, on the local education authority which made the school attendance order; and (b) in the case of offences against section 39, on the local education authority for the area to which the child in question belongs "(unless they are satisfied that proceedings for the offence have been or are to be instituted by the local education authority for the area in which the school is at which the child is a registered pupil)." But these provisions do not affect the territorial jurisdiction of the court.

There appear to be no decided cases which have any bearing on the matter. [A. E. J.]

Letters to the Editor

Substitution of Sentence by the Court of Criminal Appeal

Sir,

One factor in *R.* v. *Evans,* reported at [1957] Crim.L.R. 60, puzzles me somewhat and I will be glad if you would clarify it for me.

I note that Evans was convicted by a magistrates' court for larceny of a bicycle and was sent to quarter sessions for sentence. He qualified for preventive detention and was sentenced by quarter sessions to eight years' preventive detention. This sentence was quashed and a sentence of eight years' imprisonment substituted by the Court of Criminal Appeal.

From the reading of the report of the case it seems that the larceny of the cycle was a case of "simple larceny," the maximum punishment for which is one of five years' imprisonment. Had the requirements of section 23 of the Criminal Justice Act, 1948, been carried out, Evans would have been liable to fourteen years' preventive detention as a maximum punishment, but it was held that the requirements had not been carried out, therefore he was not liable to preventive detention at all, imprisonment only, maximum five years.

I would be glad to know the power or powers under which the C.C.A. can act in cases of this nature when varying a sentence of preventive detention to one of imprisonment for a similar term, when that term of imprisonment is higher than the statute itself allows.

Yours faithfully,

DAVID GOTHORP.

Castleford, Yorkshire.

[Mr. D. W. Elliott, who has considered the query, writes as follows:

"Section 4 (3) of the Criminal Appeal Act, 1907, provides that on an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed.

"It seems quite clear from this section that the Court of Criminal Appeal in *Evans*' case, once they had held that he could not be sentenced to preventive detention, could only vary the sentence to one which could have been given at the trial on the supposition that he was not a person who could be sentenced to preventive detention. This in the case of larceny of a bicycle is imprisonment for a maximum period of five years (Larceny Act, 1916, s. 2). Although the reports do not agree on the sentence actually passed (from 40 Cr.App.R. 165; [1956] 3 All E.R. 750; [1957] Crim.L.R. 60; [1956] 11 C.L. 434 and *The Times*, November 13, 1956, it appears that a sentence of eight years' preventive detention was varied to one of eight years' imprisonment, but from [1956] 3 W.L.R. 978 it seems that seven years' preventive detention was varied to seven years' imprisonment) all, except one, suggest, without actually saying so, that Evans was convicted on one count only of larceny of a bicycle. If this was so, the sentence substituted by the Court of Criminal Appeal seems illegal. However, the *Criminal Appeal Reports* state that the appellant was convicted of larceny and attempted false pretences and this, no doubt, is the explanation of the decision."]

Books and Periodicals

Reviews :

The Hamlyn Lectures: Trial by Jury. By the Honourable Sir Patrick Devlin, one of Her Majesty's Judges in the High Court of Justice. London: Stevens & Sons, Ltd. 1956. viii and 165 and (notes) 14 pp. (15s. net.)

In the seventh series of Hamlyn Lectures Dr. Glanville Williams devoted a long chapter to a consideration of the working of the jury in criminal cases. Now Sir Patrick Devlin has given over the whole of the eighth series to a more general account of the jury system. A subject which, as Sir Patrick says, is "so near to the heart" of the Hamlyn Trust well deserves the attention it has received; and those of the "common people"—for whom these lectures are intended—who have heard or read them should now be very nearly as well-informed on the subject as anyone can be.

Sir Patrick begins with an account of the origin and history of the jury; he discusses its selection and composition and considers its attributes as a judicial tribunal. There follows a particularly valuable discussion on the relationship between judge and jury, and the right of the judge to reject verdicts. Finally, Sir Patrick investigates the decline of jury trial and compares it with trial by judge alone. Throughout he strives successfully to avoid technicality for the benefit of the layman and lawyers will find some interesting material in the footnotes which are relegated to the end of the book.

Only a few of the many important points made by Devlin J. can be discussed in a short review. He sees in the disuse of the right of challenge a threat to "the fundamental principle that the verdict of a jury once given is final." The unanimity rule he finds to be "a startling exception to the ordinary processes of English administrative life." He would be happy to see a majority verdict in civil but not in criminal cases where a dissenting minority might suggest the existence of a reasonable doubt and impair public confidence in criminal verdicts. Unfortunately he makes no comment on the point made by Dr. Williams that juries are never instructed that their verdict must be unanimous.

The jury, in Sir Patrick's opinion, is better than a judge for deciding on the credibility of a witness and so determining "the primary facts," but the judge is better at drawing inferences. It is difficult to reconcile this with his satisfaction with the jury in criminal cases, for *mens rea* must almost always be a matter of inference. Sir Patrick believes that the jury is the best instrument for doing justice in the particular case because it produces "the best compromise that can be obtained between the demands of the law and judgment on the merits." This involves accepting, and Sir Patrick accepts it with approval, that a jury takes into account matters which the law regards as immaterial; *e.g.*, that a jury tends to favour a poor man against a rich man. Not everyone will feel complacent about this. On the other hand, it is generally recognised that judges too are sometimes moved by considerations other than those expressed in their judgments.

It is in this tendency of the jury to take into consideration the special facts that Sir Patrick finds the fundamental reason for the decline of jury trial in civil cases. There is a need for uniformity and certainty in civil cases and the result of a trial before a judge alone can be predicted with much greater confidence. Sir Patrick thinks that this need for certainty does not exist in the criminal law; when "a man is on trial for his liberty predictability is quite unimportant." Yet he emphasises that it would be unjust if, on substantially the same facts, one workman recovered damages and another did not; surely it is equally unjust if, on the same facts, one man goes to prison and another does not?

Sir Patrick believes the jury to be the "grand bulwark" of the Englishman's liberties. Dr. Williams thought that the assumption that political liberty depends on trial by jury is in truth merely folk-lore. These lectures can hardly provide the material to enable the "common people" to decide between these conflicting views; but they should at least encourage them to think about the problem.

J. C. SMITH.

Crime and the Penal System. A textbook of criminology. By Howard Jones, B.SC.(ECON.), PH.D. London: University Tutorial Press, Ltd. 1956. 262 and (index) 7 pp. (16s. net.)

This book is a textbook, as the title makes clear. For some years persons interested in criminology have hoped for a textbook by Dr. Hermann Mannheim and indeed, in this work, the preface pays tribute to him and the early chapters clearly carry the mark of his influence. A book of this nature has long been wanted in England, where for the most part the basic textbooks used by criminology students are American. In the case of these American textbooks, the complaint may be made that they are too long; this book is certainly too short and suffers from being too condensed.

The main criticism of the book must lie in the inadequacy of the later chapters dealing with the English penal system, in particular chapters IX to XVI. It is a great pity that Dr. Jones did not omit some of these chapters and concentrate upon the others which clearly are of much greater interest to him. The arrangement of some of the chapters is also not helpful, for example, the chapter on English prisons is separated from the history of the prison system by two chapters, one of which is entitled "Adjudication and Diagnosis."

Despite the heavy work involved in accurately compiling and annotating a book of this nature, Dr. Jones has kept himself free from an undue number of quotations and, particularly in the first half, has contributed considerably to the ordering and clarifying of the views expressed.

Not only the students of criminology within the universities but also those without will find this book useful, the former as a textbook and the latter for reference and occasional reading. It is admirably supplied with chapter notes containing the relevant authorities, old and modern; it is in connection with the references to recent works, on each specific topic considered, that any person interested in this subject will be particularly helped.

T. E. JAMES.

Advocacy at Petty Sessions. By B. Fraser Harrison. London: Sweet & Maxwell Ltd. 1956. x and 104 and (appendices and index) 6 pp. (15s. net.)

The young solicitor's opponent is often an experienced police officer well known and trusted by the magistrates. This concise well-written book gives the novice that initial confidence essential to present his client's case in the best way. It is no substitute for reading books on evidence or perusing Stone, but it prevents him from attempting to break some procedural rule, thus losing the respect of his client; more important, it will prevent reliance on a speech that he later discovers he will not be allowed to deliver.

There are some specific points which will doubtless be corrected in a second edition; in committal proceedings where the evidence is such that a guilty plea is inevitable at quarter sessions or assizes it is advisable to ask the prosecution witnesses questions which will produce favourable answers, as then this evidence will appear on the depositions and be read by the higher court. Chapter 2, on where to plead, is complicated and it might perhaps appear later in the book, and Chapter 8, on advocacy, might be placed earlier, before procedure. The chapter on bastardy could be expanded and needs more than the two-and-a-half pages allotted to it. Altogether the volume is well worth fifteen shillings and should be read by every aspiring police court advocate.

J. A. JOHNSON.

Though the Heavens Fall. By Lord Russell of Liverpool, C.B.E., M.C. London: Cassell & Co., Ltd. 1956. 244 and (index) 5 pp. (18s. net.)

Nine Verdicts on Violence. By Jack Smith-Hughes, Barrister-at-Law. London: Cassell & Co., Ltd. 1956. xi and 219 pp. (18s. net.)

Tales of the Criminous. A selection from the works of William Roughead made and edited by W. N. Roughead. London: Cassell & Co., Ltd. 1956. xii and 266 pp. (18s. net.)

Each of these books contains old meat warmed up for another meal, and undoubtedly the best of the three is that by Lord Russell of Liverpool, *Though the Heavens Fall.* Lord Russell's method is to illustrate a particular topic with a number of cases; thus, on circumstantial evidence we get the famous case of Elizabeth Canning, on necessity as a defence the cannibal case of Dudley and Stevens, and on the privilege of a peer the case of Lord Ferrers and that of Earl Russell's trial for bigamy. Other cases and topics dealt with are the Tranby Croft card game, murder in which the body is more or less effectively disposed of, the defence of superior orders, treason, poisoning, etc. The topics are competently dealt with and the book is well worth reading.

The same cannot be said of *Nine Verdicts on Violence.* The style of treatment of the cases is frequently dull and often reads like a copy of a shorthand writer's transcript of evidence. It is said that the cases included in this book in their time caused a great stir and that they are probably unknown today; this book shows no reason for rescuing the cases from oblivion.

Tales of the Criminous is a further collection of murder cases from the books of Roughead. Roughead was a connoisseur of murders and his enthusiasm is reflected in the way in which he presents his cases. There may be some doubt as to why some of the cases were included in this book as clearly some of them are second rate as stories, but the book is saved by Mr. Roughead's skill in presentation. Those who read the first stories, *Classic Crimes,* will wish to see this second volume also. P. A.

Law and Disorder. Scenes of life in Kenya. By Peter Evans. London: Secker & Warburg. 1956. xii and 292 and (index) 4 pp. (18s. net.)

Daughters of Cain. By Renée Huggett and Paul Berry. London: George Allen & Unwin, Ltd. 1956. 248 and (bibliography) 4 pp. (18s. net.)

There is good ground for saying that the title of a book ought to give the reader, or potential reader, at least some indication of the contents. To this reviewer's mind *Law and Disorder* suggested something more in the nature of Sir Alan Herbert's *Misleading Cases,* and he, at least, was not prepared for a serious treatise on Kenya as was in fact the case. The author, a barrister, opens the book with an account of events leading up to the present troubles in Kenya; he continues with a highly critical account of the trial of Jomo Kenyatta, in which he gave professional assistance to the defence. Mr. Evans then gives an account of a series of legal tussles in which he became engaged after he had been declared a " prohibited immigrant." It is, presumably, from this part of the book that the title has been taken and it is, indeed, true that these incidents are bizarre in the extreme. The book concludes with a comparative account of Kenya and other colonial development and deals with suggested future policies to avoid further bloodshed in Kenya. The author is clearly a man with an independent and inquiring mind, whose style of writing is forceful, persuasive and often witty. He has written a serious book on a serious subject, and has made a considerable contribution to a fast-growing volume of literature on Kenya.

Daughters of Cain is a case-book; in other words it contains summaries of a number of trials. The trials dealt with are all murder trials and they are all trials of women who have subsequently been executed; in fact, they are eight of the nine women who have been executed since Edith Thompson in 1923, namely, Susan Newell, Louie Calvert, Ethel Major, Dorothea Waddingham, Charlotte Bryant, Margaret Allen, Louisa Merrifield and Styllou Christofi, with a postscript on Ruth Ellis. The book purports to be " the story not of murder alone, but of the lives, emotions and difficulties of eight women who in the end all suffered the same death," but it suffers from the disadvantage of dealing with too much material in too small a space. However, there is always an insatiable appetite for case-books and, as these trials are carefully and competently written, there is little doubt that the book will have a wide appeal.

H. PALMER.

The Bogeyman. The exploits of Sergeant C. J. Chuck, Australia's most unpopular cop. By Vince Kelly. London: Angus & Robertson. 1956. xii and 209 pp. (15s. net.)

This is the story of Joe Chuck, a policeman in Sydney. This officer achieved considerable fame because of his many successes in the enforcement of the local laws relating to liquor and to betting, and the description of his methods is certainly quite entertaining. The author is a newspaper man who specialises in crime reporting, and his style is what is to be expected. It is, however, not in the least offensive, and once one has got accustomed to one or two peculiar Australian terms, the book makes quite good reading.

M. W. M.

The C.I.D. and the F.B.I. By Richard Harrison. London: Frederick Muller, Ltd. 1956. 196 pp. (13s. 6d. net.)

This is an excellent small book which shows some of the daily work of these two world-famous organisations. Whilst many crimes have been retold ad nauseum this book tells the story of some American crimes which cannot be familiar to all readers in this country. The book shows particularly well the difficulties of administering the law in a continent where in one state it is legal to carry a weapon if it is not concealed, whilst in another it is illegal for a man to go unarmed to church on a Sunday.

P. A.

Beds and Roses. By Denys Roberts. London: Methuen & Co. Ltd. 1956. 231 pp. (12s. 6d. net.)

We closed our review of Mr. Roberts' first novel with the hope that he would do better next time. We must regretfully record that our hope has not been fulfilled. Whereas in his first book there were passages of genuine humour which were quite a joy to read, his second book throughout is cast in a style which can only be described as facetious. The characters, poorly drawn as they are, are without exception tiresome and uninteresting, and the plot is so farcical as to be merely stupid. All this is a great pity. We are convinced that there is plenty of room for good novels with a legal background and we had hoped that Mr. Roberts, when he settled down, would provide some. On the evidence of this book, however, we do not foresee that this will come about.

M. W. M.

Books Received:

Case for the Prosecution. By H. G. Castle. London: The Naldrett Press. 1956. xi and 180 pp. (16s. net.)

Sudden Death. By David Haler, M.B., D.C.P., Consultant Pathologist to Plaistow Hospital. London: E. G. Berryman & Sons, Ltd. 1955. ix and 82 and (bibliography and index) 8 pp. (12s. 6d. net.)

Reader's Digest:

Children and young persons: The future of juvenile courts: 13 *The Magistrate* 9.

Contempt of court: Absolute liability: 73 *Law Quarterly Review* 8.

Emergency laws: Provisions relating to petrol rationing: 121 *Justice of the Peace* 5.

Evidence: The presumption of innocence: 107 *Law Journal* 37, 54.

Forensic science: Identification by patterns: 3 *Journal of Forensic Medicine* 169.

Gaming: Small gaming parties; section 4 of the Small Lotteries and Gaming Act, 1956 [1956] Crim.L.R. 639: 107 *Law Journal* 8.

Insanity: The effect of the interpretation given in *R.* v. *Kemp* [1956] Crim.L.R. 774 of the words " disease of the mind " in the McNaghten rules: 20 *Modern Law Review* 55.

Murder: The crime passionnel, a lecture delivered at the University of Cambridge by M. Marc Ancel, Judge of the Supreme Court of France: 73 *Law Quarterly Review* 36.

Murder: The paranoid murderer: 3 *Journal of Forensic Medicine* 149.

Practice: The solicitor in the criminal courts: 100 *Solicitors' Journal* 36.

Road traffic: Disqualification: 13 *The Magistrate* 2.

Road traffic: Public service vehicles: 121 *Justice of the Peace* 32.

Road traffic: Vehicles of travelling showmen: 65 *Police Review* 24.

THE
CRIMINAL LAW REVIEW

Editors
JOHN BURKE and PETER ALLSOP, M.A.
Barristers-at-Law

Editorial

Presence of the appellant in the Court of Criminal Appeal

Under section 11 of the Criminal Appeal Act, 1907, " an appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone. . ." In *R.* v. *Dunleavey* [1909] 1 K.B. 200 it was held that this provision is imperative and that the prisoner has a right to be present.

On February 25, in *R.* v. *Balmforth,* Lord Goddard C.J. raised the question whether such a right is necessary where an appeal is against sentence only. " The court has always read the cases, and very often they have decided before they hear anything about the case to give a substantial reduction. In other cases they can see that it is not a case in which they will be able to interfere ; but the result of the section which provides for the right to be brought up is that the country is put to a great deal of expense, and the Prison Service at a time when they certainly have not too many prison officers is put to a great deal of inconvenience because these prisoners have to come from distances and they have to be escorted. In the last case the prisoner came from Swansea, in two previous cases from Liverpool, and it does put a considerable expense on the country and a considerable strain on the Prison Service, and I am wondering whether it would not be now enough if they were only brought up if the court considered it was right that they should be present. Sometimes the court does want to see the prisoner. Of course, if the court is going to put the prisoner under recognisance or grant probation, we have to see the prisoner because he has to acknowledge his recognisance before the court; but I cannot think it is necessary where the prisoner is always allowed to put everything he wants to say to the court in writing that he should always be brought up for the reasons I have given; and I hope that some day this will be considered, that is, the statutory procedure of this court ought to be considered."

Causing death by dangerous driving

At [1957] Crim.L.R. 191 we reported one of the first cases in which the defendant was charged under section 8 of the Road Traffic Act, 1956, with causing death by dangerous driving. At the Central Criminal Court on February 22, Havers J. fined a defendant found guilty of this offence £200, with the alternative of six months' imprisonment, and disqualified him from holding a driving licence for twenty years. The maximum penalty under section 8 is five years' imprisonment. The prosecution alleged that the deceased was struck from behind by the defendant's car which was on the wrong side of the road. The defendant did not stop but drove home and then to a garage to have the damage done to his car repaired. The jury recommended leniency in view of the defendant's age, which was sixty-five.[1]

On February 25 at the Central Criminal Court another aspect of the same offence fell to be considered by the same judge. The defendant was charged on an indictment containing two counts, one for manslaughter, one for causing death by dangerous driving contrary to section 8. Before taking the plea and after argument Havers J. ruled that under the Indictments Act, 1915, Sched. I, r. 3, both counts might properly be joined in the same indictment. The ruling of the Court of Criminal Appeal in *R.* v. *Large* (1939) 27 Cr.App.R. 65 to the effect that no counts for other offences should be joined in an indictment for manslaughter did not apply in the light of the new circumstances created by the Road Traffic Act, 1956.

Living on the earnings of prostitution

In *R.* v. *Silver* [1956] Crim.L.R. 338 Judge Maude Q.C. held that landlords who charged prostitutes higher rents than they would normally demand were not living on the earnings of prostitution. This decision was much debated at the time it was given. At the Central Criminal Court recently Pilcher J. had occasion to consider a similar case and he disagreed with the decision in *R.* v. *Silver*. We report his judgment at p. 255.

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[1] *The Times,* February 23, 1957.

Police methods

On an appeal from a conviction for dangerous driving at Middlesex Sessions objection was taken to the evidence of photographs taken from a moving police car. The photographs were of the defendant's van overtaking a number of vehicles. The camera was mounted on the centre part of the near side windscreen of the police car and was operated by a policeman, who said in evidence that he had a layman's experience of photography and had received written and verbal instructions on how to use the box type camera. A professional photographer gave evidence that the lens of the camera used by the police produced a distortion and false perspective; it made the vehicles appear closer together than they really were. The witness did not consider that the camera used by the police was suitable for taking an action photograph from a moving car. The appeal was dismissed.[2]

With the development of modern techniques of photography it would seem that photographs could be of much value as evidence, provided that the necessary safeguards are taken to ensure their accuracy. Moving films might provide even more cogent evidence. But, as in the case of tape recordings, due regard must be paid to the possibilities of the evidence being misleading.

Reward for arresting deserters

Mr. A. E. Jones, a contributor to the *Criminal Law Review*, caused a small stir recently when he advised Mr. Paul Bennett that under the Army Act, 1955, there is now no power to reward a person for apprehending a deserter. It appears that under article 492 of the Pay Warrant, 1950, which is still current, a reward not exceeding 20s. may be paid to any person for apprehending a deserter, and that the War Office are prepared to pay the reward when it is properly recommended. The Home Office, however, has expressed its wish that no such payment should be made to police officers, whose ordinary duty it is to arrest deserters, and since the beginning of the year the Army form printed for use in such cases in magistrates' courts has not included the former provision for magistrates to recommend a reward.[3]

Juvenile delinquency in Russia

In the Soviet Union statistics of juvenile delinquency have been disclosed publicly for the first time. They show that in 1955 5·6 per cent. of the crimes committed were committed by people under seventeen, and in 1956 5·2 per cent. In 1955 1·2 per cent. of the crimes were committed by people under sixteen, in 1956 1 per cent.[4]

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[2] *The Daily Telegraph*, February 21, 1957.

[3] See *The Times*, February 19, 1957.

Parliament

Magistrates' courts

The Home Secretary rejected a suggestion that he should introduce legislation to make it compulsory for examining justices to hold committal proceedings not in open court (H.C. Debates, Vol. 565, col. *197* ; February 28).

Prisons

All convicted prisoners who are fit for work are required to work. All untried prisoners may work if they so wish. Payment is made for all work satisfactorily performed except that a prisoner's earnings may be temporarily stopped for an offence against prison discipline. During the week ended January 15, 1957, the number of male prisoners entitled to weekly payment for work performed was 17,434, and of female prisoners 654. The total amount paid in earnings was £2,050 (Vol. 565, col. *134* ; February 25). Since untried prisoners must be kept apart from convicted prisoners this very narrowly limits the work that can be made available to them, and they are employed on the manufacture and repair of mailbags (Vol. 565, col. 1395 ; February 28).

In 1926, 45 men were sentenced to terms of imprisonment for a period of seven years or more. In 1936 the number was 39. In 1955, 292 men received sentences of imprisonment or preventive detention of this length (Vol. 565, col. *135* ; February 25).

During 1955, 13,244 men and 1,499 women sentenced to serve up to and including five months' imprisonment were received into prison (Vol. 565, col. *157* ; February 26).

During 1955, 9,838 men and 614 women were committed to prison for failure to comply with an order of a competent court for the payment of money (Vol. 565, col. *188* ; February 27).

Children and young persons

In 1955, 10,321 children under twelve years of age were found guilty of indictable offences in England and Wales. Of the 22,237 children under fourteen found guilty of indictable offences, the majority, 8,860, were placed on probation, and over 8,000 received either an absolute or a conditional discharge (Vol. 563, col. *238* ; February 1, 1957).

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[4] *Manchester Guardian*, February 13, 1957.

In 1956 there were 2,273 abscondings from approved schools, the highest number since 1952; the average population was 6,823, the lowest since that year. Corporal punishment was awarded in 3,078 cases. The average population of remand homes was 624, again the lowest since 1952. There were 278 abscondings and corporal punishment was awarded in 276 cases (Vol. 565, col. *82*; February 21).

Firearms

The existing law as to shotguns, which prohibits the purchase or hire of shotguns by persons under seventeen, but imposes no other restrictions on their possession or use, is based on a report submitted by a departmental committee in 1934. The committee considered that the imposition of further controls would be unlikely to reduce the number of accidents resulting from their use. The Home Secretary knows no reason for now imposing such controls (Vol. 564, col. *211*; February 14).

Police

The Home Secretary pointed out that the power of a police constable under section 66 of the Metropolitan Police Act, 1839, to stop, search and detain a person reasonably suspected of having or conveying anything stolen or unlawfully obtained is not restricted to constables in uniform or to the hours of darkness (Vol. 564, col. *81*; February 7).

Delinquency

£10,934 has been paid from the Home Office Vote for research under section 77 of the Criminal Justice Act, 1948, into the causes of delinquency, and a further £1,000 was still to be paid at the end of February. In addition, £2,488 has been spent by the Social Survey as an allied service on behalf of the Home Office for research on delinquency and the treatment of offenders. In 1949 and 1950 the Home Office and Prison Commission gave encouragement to and facilities for a number of research studies. In each financial year from 1951–1952 onwards grants have been made to assist approved research studies at various universities, and recently such research has been undertaken by Home Office staff (Vol. 565, col. 135; February 25).

Judicial appointments

Sir David Arnold Scott Cairns, Q.C., has been appointed Recorder of the Borough of Sunderland, Mr. John Megaw, Q.C., Recorder of the Borough of Middlesbrough, Mr. George Stanley Waller, Q.C., Recorder of the City of Sheffield, Mr. Geoffrey de Paiva Veale, Q.C., Recorder of the City of Leeds and Mr. W. A. Fearnley-Whittingstall, Q.C., Recorder of the City of Leicester.

A Policewoman's Training

During their six months' recruit training, Japanese policewomen are trained in police duties, revolver shooting, judo, flower arrangement and music: 65 Police Review, 82.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Assault and Words

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-Law*

Although assault and battery are among the oldest crimes, there are still some points on which the law is not settled. In practice, difficulties are often solved by binding over to keep the peace, or by making use of the provision in the Public Order Act, 1936, with respect to insulting behaviour. It hardly needs to be pointed out that these are often imperfect substitutes for an application of the law of assault. In particular, section 5 of the Public Order Act is limited to threatening, abusive or insulting words or behaviour in a public place or at a public meeting, and has no application to assaults committed in a place that is not "public" within the definition in the Act, unless at a public meeting. For this reason it is of more than theoretical interest to attempt to state with precision the way in which the utterance of words may make or unmake an assault. On both points there is some misapprehension in the authorities and textbooks.

An assault in the strict sense, as opposed to a battery, may be defined as any conduct creating the apprehension of immediate force (*e.g.*, a menacing gesture), provided that, to constitute a crime, there must be the requisite *mens rea*. Three matters will be considered: the immediacy of the force threatened, conditional threat as an assault, and assault by words only.

The threat must be of immediate force

Gestures that merely convey a threat to commit a battery in the future are not an assault. Thus in *Stephens* v. *Myers* (1830) 4 C. & P. 349, where D was advancing upon P with a clenched fist when he was intercepted, the question left to the jury was "whether his blow would almost immediately have reached [P], if he had not been stopped." A hostile gesture is not enough. Accompanying words may have the same effect of removing from a gesture the immediate threat that it might otherwise imply. In the well-known case of *Tuberville* v. *Savage* (1669) 1 Mod. 3, Tuberville put his hand on his sword, and said to Savage: "If it were not assize-time, I would not take such language from you." Savage thereupon attacked him, and in the ensuing fight Tuberville lost an eye. Tuberville sued for assault and battery, and Savage pleaded self-defence. In this way the question arose whether Tuberville had assaulted Savage initially, so as to give rise to a right of self-defence. It was ruled not, and Tuberville accordingly recovered damages. His words had shown clearly that, the assize judges being in town, he had no present intention of breaking the law.

It should be noticed that menacing conduct is an assault if it creates apprehension *before* reassuring words are uttered. It is quite possible that in *Tuberville* v. *Savage*, Tuberville would have been liable in damages on this ground if Savage had sued him, or subject to punishment if he had been prosecuted. However, the issue between the parties was not whether Tuberville was liable for an assault, but whether Tuberville's conduct gave Savage the liberty to act in self-defence. Once Tuberville had uttered the qualifying words, whether or not there had previously been an assault in law, he removed the immediate threat to Savage's safety which alone would have justified Savage in striking him.

Conditional threat as an assault

The rule in *Tuberville* v. *Savage,* that words may negative or end an assault, was misapplied in *Blake* v. *Barnard* (1840) 9 C. & P. 626, where the facts given in evidence were that D presented a pistol at P and said: " If you are not quiet I will blow your brains out." According to the report (which may not be accurate), Lord Abinger, in summing up, directed the jury that " if the defendant, at the time he presented [the pistol] added words showing that it was not his intention to shoot the plaintiff, that would be no assault." Although literally unimpeachable, this direction was totally inadequate having regard to the evidence that the jury had to consider. There was a great difference between the words used in *Tuberville* v. *Savage* and those used in the case at bar. In the former case, the declaration of the desire to kill was made subject to an extraneous condition (" If it were not assize-time "), which was known to the other party not to be fulfilled. The unfulfilled condition therefore nullified the threat. But in the present case, the threat was conditional upon the way the plaintiff thereafter behaved; in order to avoid being killed he had to keep quiet, and his conduct was therefore constrained by the threat. The plaintiff, in other words, was subject to the fear that if he spoke he would be shot. It is submitted that in these circumstances the presentation of the pistol was an assault. Otherwise, indeed, the highwayman who says " Your money or your life," at the same time presenting a weapon, would not be guilty of assault at common law—a proposition which it is impossible to believe.

The argument against *Blake* v. *Barnard* does not rest only on common sense and legal principle: there is positive authority against it. In an old case, P went to arrest D lawfully, and D made a menacing gesture with a pitchfork to avoid being arrested. The court was clear, although the opinion was only an *obiter dictum*, that this was an assault on P (*Genner* v. *Sparkes* (1704) 1 Salk. 79). Yet the menacing gesture was presumably only a conditional menace; it was a way of saying: "If you come any nearer I will stick this into you."

Here the condition was one that the defendant had no right to impose, and his menace was an assault. But, according to some authorities, a menace will equally be an assault even if the defendant merely demanded an act to which he had a legal right—if the menace was an improper way of enforcing his legal right. For example, a trespasser may be ejected by force, but only by moderate force, not amounting to death or serious bodily harm. A threat to cause serious harm to a trespasser if he does not leave is held to be an assault. In *Read* v. *Coker* (1853) 13 C.B. 850, D, the occupier of premises, told P to leave, and on his failure to do so collected together some men, who mustered round P, tucking up their sleeves, and threatened to break his neck if he did not leave. P, fearing that they would carry out their threat, departed. It was held that D was liable for assault. P became a trespasser on his failure to leave, but it would not have been lawful to break his neck, or to inflict any other serious harm upon him, or to use any force against him except what was necessary for his ejection. The threats went beyond that, and therefore constituted an assault.

The correctness of this decision on the particular facts is perhaps not entirely beyond question. Although it is true that only moderate force may be used to eject trespassers, it does not follow that a threat to use immoderate (extreme) force should be held to be unlawful. For a mere threat to use immoderate force, not carried out, might be held to be moderate force. If one looks at the situation realistically, there is less affront to the dignity in being merely threatened with having one's neck broken if one does not leave, than in being hustled out by main force. It is strange if the latter is lawful and the former unlawful. Even if the occupier has gone so far as to threaten the trespasser with a gun, there would seem to be no pressing necessity to regard such an act as anything more than the use of moderate force within the meaning of the rule relating to the ejection of trespassers. It seems, however, that the courts are committed to the opposite view. In *Osborn* v. *Veitch* (1858) 1 F. & F. 317, Willes J. ruled that it was unlawful to point a gun at a man in order to restrain him from making an unlawful arrest.

Another query on *Read* v. *Coker* is whether the court was not too naive in taking literally the threat to break P's neck. Whatever this expression meant in 1853, one may doubt whether it should today be understood to mean what it says.

Returning to the main point, that a conditional threat imposing a restraint upon conduct is capable of amounting to an assault, this is strongly supported by American authorities. In *State* v. *Myerfield* (1867) 61 N.C. 108, the defendant stood in the door of his grocery, holding a pistol in his hand, sometimes bringing it to bear on the complainant and sometimes not, and swearing that if the complainant came in he would shoot him. It was held that the defendant was guilty of an assault, even though his words intimated that the complainant would not be shot if he did not enter the shop. Pearson C.J. explained the law of conditional threats as follows. When the offer to strike is explained by words showing that it is not the intention of the party to strike, as where the defendant raised a whip and said, "If you were not an old man, I would knock you down," this is not an assault. (The English authority for this proposition is *Tuberville* v. *Savage*.) On the other hand, when the offer is made with a condition precedent showing that it is not the intention to strike provided that the condition is performed by the other, a distinction is taken. If the condition be one which the party has a right to impose, the offer to strike unless the condition is complied with is not an assault. The example given by Pearson C.J. was where one, being forbidden, is about to enter my house, and I raise a stick and say, "If you attempt to enter I will knock you down," there is no assault, even though it would be battery for me to carry out my threat. (It will be perceived that this opinion is inconsistent with *Read* v. *Coker*.) But if the condition be one that the party has no right to impose, the offer to strike is an assault, notwithstanding the condition; as if one raises a stick and says, "Pull off your hat," or "Deliver up your money, or I will knock you down." The learned Chief Justice then went on to say that there was an exception to the general rule where the offer to strike was made with a deadly weapon; here the law did not allow the case to be qualified by the imposition of a condition, even though it was one that the party had a right to impose. It was for this reason that the defendant was held liable for assault. In England there is no authority for distinguishing between threatening with a deadly weapon and other threats of extreme force, and the view taken here, as already pointed out, is that a threat of extreme force is unlawful if the use of the force would be unlawful.

Another American case bearing on the subject is *Hairston* v. *State* (1877) 54 Miss. 689. The defendant pointed a pistol at another person and said: "I will shoot any man who attempts to stop my mules." It was held that the defendant could not on these facts be convicted of an assault with intent to murder, because the intent for such an assault must be absolute, not conditional. But the court intimated that he could have been convicted of an assault simply, because he had threatened more force than he could lawfully have used. If the mules had been stopped, he could have used moderate force, as by striking with the hand, or threatening to do so. Since he could not have justified actual shooting to prevent his mules being stopped, he could not justify threatening to do so. The general line of argument accords with that implicit in *Read* v. *Coker*.

Other American cases supporting the criticism here made of *Blake* v. *Barnard* are *U.S.* v. *Myers* (1806) 1 Cranch C.C. 310; *People* v. *Connors* (1912) 253 Ill. 266, 97 N.E. 643; *People* v. *Henry* (1934) 356 Ill. 141, 190 N.E. 361.

A conditional threat imposing a restraint upon conduct is capable of amounting not only to an assault but to a false imprisonment. The English case of *Grainger* v. *Hill* (1838) 4 Bing.N.C. 212 at 220 seems to be authority for the proposition that if an officer of the law announces that he will arrest another person unless the latter gives up a certain thing in his possession, and he complies, this is sufficient constraint upon the person to amount to an imprisonment. The reason for the rule is obvious: an officer who makes such a threat is impliedly saying that the other must not go out of his presence until he complies with the condition. The threat therefore becomes an imprisonment as soon as the other person submits to the pressure by complying with the request. By a slight extension of this reasoning, it might be held that there is an imprisonment if the officer makes it clear that he will not let the suspect go until he answers a question (for instance, gives his name and address), and if the suspect complies under this duress. Even if the suspect does not comply, the mere making of the threat should be accounted an assault in the absence of justification or excuse, at least if there is some gesture to found the charge of assault. Whether assault can be by words alone has still to be considered.

Can assault be by words?

It is stated in nearly all the books on criminal law and the law of tort that words cannot make an assault. The judicial authority for this supposed rule is of the slightest: little more than a direction to the jury in *Meade* (1823) 1 Lewin at 185. Its main support derives from uncritical repetition by legal writers. A moment's reflection will reveal severe objections. For one thing, the opinion would deny the possibility of an assault (as opposed to a battery) in pitch darkness, when a gesture cannot be seen but menacing words can be heard. There seems to be no reason for denying to plain words the legal effect that will be given to a gesture, whether the words are spoken in the dark or otherwise. Mention has already been made of *Genner* v. *Sparkes,* where a merely symbolical gesture—a gesture that was intended to be read as a conditional threat—was held to be an assault. Why should not express words be treated in the same way, without the gesture? The other English case which has just been discussed, *Read* v. *Coker,* may be used to reinforce the argument. There, the defendant through his servants used express language to the effect that they would break the plaintiff's neck if he did not leave, and this threat was held to be an assault. It is true that there was a gesture in addition to the words used, namely the act of the men in gathering round and tucking up their sleeves. But although this gesture doubtless added effect to the words, and showed beyond a doubt the immediacy of the threat, it is hard to see why it should be legally required where the other essentials of assault are present. If a highwayman, visibly armed, says: " Your money or your life," should he escape the consequences of the law of assault merely because he does not trouble to point his pistol at his victim? If the pistol obviously lies loaded to his hand, he surely need not reach for it to constitute an assault. Nor need there be a pistol at all. If D says to P: " Be quiet, or I will knock your block off," or if, behind P's back, he says: " Don't turn round or I shoot," such a threat ought to be accounted an assault (even though, in the second case, D is not in fact armed).

How can this opinion be reconciled with the traditional statement that words do not make an assault? It is submitted that the statement is true only as a restatement of the rule that an assault involves the apprehension of immediate force. A verbal threat of force in the future is not an assault, not because it is verbal but because it is not immediate. A verbal threat of immediate force has all the essential elements of an assault, particularly where it is uttered with the intention of imposing a present restraint upon the conduct of the victim. There is nothing in the English decisions contrary to this view.

Indeed, if one goes back to the middle ages express support can be found for it. In medieval times there existed a special form of trespass for menaces, which was regarded as a kind of writ of assault though it lay for mere words. " Menaces " meant threats of immediate injury, whether coupled with a condition or not. This action has not only failed to make an entry into the modern works on tort and crime but is not even noticed in the legal histories. There is, however, no reason to suppose that it could not be successfully revived. The best illustration of it is a Year Book case of 1459 when John Paston sued his redoubtable Norfolk antagonist Robert Ledham for damages for menaces (Y.B. M. 37 H.6.2b, pl.4; P. 37 H.6 19b, pl.8). The words of the writ alleged that the defendant made insult to the plaintiff and uttered such and such threats to take away his life and mutilate his members (" *quod insultum fecit et tales et tantas minas de vita sua et mutilacione membrorum suorum* " etc.); and the report calls this a writ of trespass for assault. The case went off on points that are not here relevant, but no objection was made to the form of the writ, nor any suggestion that it did not disclose a good cause of action. Prisot C.J., in the course of the case, said: " If a man says to me that if I will not give up the suit that I have against him, he will beat me, it shall be said to be an assault, and yet it is conditional " (Y.B. P. 37 H.6 at 20b).

Paston, in one of the well-known family letters, represents Prisot as a partial judge; but of this Foss remarks, in his *Biographia Juridica,* that it is " merely the representation of a disappointed partisan in a particular case. There is no doubt that he was a considerable and expert lawyer." In any event there is other Year Book authority for the existence of an action of trespass for menaces. Before *Paston* v. *Ledham* there was the case in (1353) 27 Lib.Ass. pl. 22; but that concerned the King, which might have made a difference. No doubt was cast upon the action in a later case of 1476, abstracted in Brooke's Abridgement, title Trespass pl.388 (not to be found in the Year Book cited by Brooke). See also Fitzherbert's Abridgement, title Trespass pl.143. It is submitted that, taken together, these cases are sufficient authority for the existence of the action. Owing to the remarkable continuity of English law, they can be cited in court even at the present day as authorities for the law stated in them.

Prosecutions Under Some Recent Statutes

By J. F. GARNER, LL.M., *Town Clerk of Andover*

In his interesting articles on "The Power to Prosecute," in [1955] Crim.L.R. 596 and 668, Dr. Glanville Williams quite rightly dealt specially with the position of local authorities as prosecutors—a matter which may well give rise to difficulties in connection with several statutes passed during 1956.

Agriculture (Safety, Health and Welfare Provisions) Act, 1956

In the first place, the Agriculture (Safety, Health and Welfare Provisions) Act, 1956,[1] confers certain functions in connection with the provision of sanitary conveniences on "agricultural units" (*anglice,* "farms") on local authorities, leaving other functions, in the manner of the Factories Acts, to Ministry inspectors. The local authority may serve a notice under section 3 or section 5 of the Act, and, subject to the defences provided for in the section, any person who fails to comply with the requirements of such a notice will be guilty of an offence. Section 14 provides for the punishment of offences, but it is not provided in the Act (as it is in the somewhat similar provisions of the Factories Act, 1937: see section 8 (1)) that sections 3 and 5 of the Act "shall be enforced by the local authority"; the Act is, in fact, silent on the point.

Section 276 of the Local Government Act, 1933, provides that "where a local authority deem it expedient for the promotion or protection of the interests of the inhabitants of their area, they may prosecute or defend any legal proceedings." Although this section is drawn in reasonably wide terms, it seems doubtful whether it could be said that the provision of adequate and clean sanitary conveniences for the use of employees at a particular farm (the object of sections 3 and 5 of the 1956 Act) could be said to amount to "the promotion or protection of the interests of the inhabitants" of the particular local authority's area. The power to prosecute—and to incur expenditure out of the general rate fund in instituting proceedings—for offences under section 3 or section 5 does not, therefore, seem to have been conferred on the local authority. In accordance with Dr. Glanville Williams's arguments,[2] it is submitted that in these cases proceedings should be taken by the local authority's chief public health inspector or other responsible officer in his own name as a member of the public and on his own responsibility—and the local authority cannot be made responsible for costs in the event of an unsuccessful prosecution.

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[1] [1956] Crim.L.R. 636.

Small Lotteries and Gaming Act, 1956

Similarly, under the Small Lotteries and Gaming Act, 1956,[3] although the local authority are the registration authority, they are not made expressly responsible in the statute for undertaking prosecutions for offences or otherwise for enforcing the provisions of the Act. The registration authorities—county and county borough councils—under the Pool Betting Act, 1954, are expressly given power to take proceedings for offences under that Act (see section 8 (4)), but no similar provision in favour of the county borough and county district councils (the registration authorities) has been included in the new Act. Presumably, again, an officer of the local authority, such as the town clerk, could lay an information and take proceedings in his own name and on his own responsibility for offences, such as conducting a lottery without first obtaining registration, failing to observe the conditions of section 1 (2), or failing to send in a return under section 3 (2), but it is clearly assumed by the Home Office that such proceedings will normally be taken by the police.[4]

Clean Air Act, 1956

Under the Clean Air Act, 1956,[5] the position is clearer, as by section 29 thereof, it is made the duty of the local authority to enforce the provisions of the Act. Moreover, by section 31 (1), the provisions of Part XII of the Public Health Act, 1936, are, subject to certain modifications not here material, applied to proceedings taken under the new Act. Thus, all offences may be prosecuted under the Magistrates' Courts Act, 1952 (1936 Act, s. 296), and proceedings for an offence may not, without the consent of the Attorney-General, be taken by any person other than a "person aggrieved" or the local authority (*ibid.*, s. 298). Police prosecutions may thus not be brought under this Act—a very understandable provision if we may say so, and it is only surprising that this observation does not also apply to the Agriculture (Safety, etc.) Act (above).

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[2] [1955] Crim.L.R. 673.

[3] [1956] Crim.L.R. 639.

[4] See Home Office Circular 93/1956, dated July 11, 1956.

[5] [1956] Crim.L.R. 645.

Road Traffic Act, 1956

The position under that general "rag-bag," the Road Traffic Act, 1956,[6] is more complicated. Section 12 empowers the local highway authority to authorise the holding of a motor vehicle trial on a public bridleway or footpath, but proceedings under the section may be taken only by the police (or a private prosecutor). Section 15, which enables a local authority to provide—by a complicated procedure similar to that applicable to the making of byelaws—that a dog may not be allowed to be on particular stretches of road unless it is "held on a lead," gives the authority power to take proceedings for an offence under the section. The same observations apply to the sections dealing with parking places (see section 22 (7)). Section 42, dealing with the provision of protective helmets for motor-cyclists, again empowers the local authority to take proceedings for offences under the section, but makes the section extremely difficult of effective enforcement, in that it fails to give the local authority power to enter on and inspect shops or other premises holding stocks of helmets offered for sale.[7]

Life would be just that little easier for local authorities and their officers—and for the magistrates and their clerks—if points such as these could invariably be provided for in new statutes as they are drafted. By now there really should be a common code on such points—and on allied subjects such as the mode of signature and service of statutory notices (section 285 of the Public Health Act, 1936, applies only *sometimes*), powers of entry and how these may be exercised, means of recovery of expenses by a local authority, etc.—which could automatically be applied by the draftsman when giving new functions to the local authority.

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[6] [1956] Crim.L.R. 608, 673, 758.

[7] *Cf.* section 2 of the Heating Appliances (Fireguards) Act, 1952, dealing with a somewhat similar subject, whereby the local authority are given all the legal machinery they could reasonably require.

Mr. Sutterthwick's Court

By A. E. Jones, *Magistrates' Clerk*

Living on Immoral Earnings

As the young man made his entrance there was a stir at the back of the court where a little group of gaudily dressed women made an exotic splash of colour in the usual drab human background to Mr. Sutterthwick's view from the bench. Victor Cankwich's gestured acknowledgment of the craning feminine heads and excited whispers had almost the quality, if not the elegance, of a monarch's greeting to his subjects. Mure, the assistant gaoler, guided him into the dock and introduced him to the magistrate as "Charge Number 11, your worship."

Mr. Dotwell rose from the solicitors' seat and said: "I appear to prosecute for the borough police in this case, if it please you, sir."

"Want it dealt with here?" queried Frell, the clerk, over his shoulder, with the brevity of one technician to another.

"Yes, it is a case I ask you to try summarily under section 18 of the Magistrates' Courts Act, sir," said Mr. Dotwell with dignity, addressing the magistrate.

"You are charged with knowingly living wholly or in part on the earnings of prostitution. Do you plead guilty or not guilty?" said the clerk, addressing Victor Cankwich.

"Not guilty. It's all a frame-up. Can I have free legal aid, please?"

"Haven't you any savings?" asked Mr. Sutterthwick.

"No, sir."

"What do you earn a week?"

"I'm out of work, sir."

The magistrate looked thoughtfully at the charge entered in his register and said: "It seems to me that this case will be a matter of plain facts, and you'll probably be able to make your defence quite adequately yourself. I don't think, at present, that I should ask the general public to pay for a solicitor for you; but if difficulties arise during the hearing I'll reconsider your application."

"You know what the charge is, sir," said Mr. Dotwell. "In a nutshell, the evidence of the prosecution will be that . . ."

"I've got a number of other cases still to come—including three remands," interrupted Mr. Sutterthwick. "I don't think I can try this case this morning. It's bound from its nature to take some time."

"There isn't a long police observation, as there so often is in this type of prosecution. I think this case will turn out to be quite a short one," said Mr. Dotwell persuasively.

"I hear that forecast made quite frequently—and quite frequently it doesn't come true, Mr. Dotwell."

"Well, sir, if you don't trust my powers of prophecy, would you, at least, hear the woman in the case? For reasons which I need not labour I am particularly anxious to have her evidence on record at the earliest possible moment."

"Her statement was perfectly plain and unequivocal when she swore the information for the warrant."

"Yes, sir, but in a case of this sort one never knows what may happen during a remand."

"Very well, Mr. Dotwell, call your witness and we'll see how far we can get."

"Thank you, sir. Perhaps it would help you if, first of all, in just a few brief sentences I opened the case. . . ."

"I don't think it's really necessary, Mr. Dotwell. It was only yesterday that I read the information. The main outlines of the evidence are still in my memory."

Mr. Dotwell had prepared the case with his usual thoroughness, and his polite "As you please, sir," concealed all the disappointment of an artist who sees a creation mutilated by an insensitive patron. Regretfully, he relegated a sheet of notes to the bottom of his pile of papers, and, turning the pages of his brief, he said: "Call Sonia Sibson, please."

The first witness

Sergeant Quing, the warrant officer, disappeared into the waiting hall and came back with a tall young woman, who moved with an undulating elegance and disdainful assurance which had been painstakingly copied from an admired fashion model. The suggestion of a dress show was maintained by her clothes which were exaggeratedly modish, and by her face which appeared to have been lacquered before being coated with powder. She took the oath in a rather bored way, speaking with a Kensington accent which still had some rough Hackney edges; she then stood composedly in the witness-box, taking in her surroundings—though it was noticeable that she was careful not to look towards the dock. The prosecuting solicitor and the clerk received only a half contemptuous glance each, but she regarded Mr. Sutterthwick with marked interest, and seemed to be waiting for some reciprocation of this when Mr. Dotwell called for her attention by asking her name and address.

Having obtained these particulars he next inquired her occupation.

"I haven't any," was the reply.

"Well, how do you live? Where do you get money from?"

"From men."

"And what do men give you money for? I'm sorry, but I'm afraid I have to ask you that."

"The usual thing."

"You'll have to explain that in more detail for the purposes of this case," persisted Mr. Dotwell.

But Mr. Sutterthwick, with the rest of his morning's work urgently present in his mind, broke in with: "Do you mean you are a prostitute?"

"Yes, of course."

"Thank you, sir," said Mr. Dotwell. "You appreciate that I couldn't lead her on that point as it's such a vital part of the charge."

"I don't imagine there's going to be any dispute about it," remarked the magistrate.

Having elicited from the witness without much difficulty that she had been a prostitute for seven or eight years, and that she paid £8 a week for a flat which was in her name, Mr. Dotwell turned his questions to the next part of her evidence.

"Will you now look round the court and see whether there's anybody here you recognise," he directed.

Sonia Sibson did as asked and, with obvious distaste, said: "Well, I know those ladies at the back."

"Yes, well, never mind about them," said Mr. Dotwell patiently. "Look again, and see whether there's anybody else you recognise."

Once again Mr. Sutterthwick, with one eye on the clock, intervened. "Do you know that man over there in the dock?" he said.

"Yes, of course; he's my husband," was the calm reply.

"Your husband?" exclaimed Mr. Dotwell, in great surprise. "You didn't tell the police that."

"They never asked me."

"Of course not. You gave your name as Sibson. Why don't you call yourself Cankwich if you're married to the prisoner?"

"I don't like the name. And Sibson is my professional name, so I thought I'd better keep to it."

"I suppose she's entitled in law to use any surname she pleases, even though she is married," interposed Mr. Sutterthwick.

"In strict law she probably is, sir," said Mr. Dotwell grudgingly. "But it's very misleading."

"It's probably meant to be," commented the magistrate.

A wife's competency to give evidence

"It puts me in a difficulty," pursued the prosecuting solicitor. "If she's the prisoner's wife questions arise about her giving evidence which I hadn't considered up to now."

"She's an admissible witness on this charge," put in Frell.

"I realise that," said Mr. Dotwell. "But is she compellable, or should she have been told she needn't testify against her husband if she didn't wish to?"

"No, she's not compellable," said the clerk.

"Mr. Frell is usually right in these matters," said the magistrate.

But it was not so easy to remove the burden of personal responsibility which always seemed to weigh Mr. Dotwell down in the police prosecutions which constituted the major part of his practice. "Without doubting that in the least," he said politely, "I should feel happier, sir, if you would have the point looked up—just to be quite sure."

The clerk found the relevant note in *Stone* [1] and showed it to Mr. Sutterthwick, who read it out.

"Thank you, sir. That seems quite clear," said Mr. Dotwell.

"You understand," said the magistrate to the witness. "You needn't give evidence in this case if you don't want to."

"But I do want to," she said.

The prosecuting solicitor resumed his examination, and with comparative ease extracted the information that when the prisoner married the witness he knew that she was a prostitute, that, since the marriage, he had followed no occupation and had had no source of income except the money she gave him, and that he undoubtedly knew where that came from because he was frequently in the flat when she brought men there. Mr. Dotwell's endeavours to obtain from her an itemised account of the sums she had given her husband were not so successful, but he persevered gallantly against her airy vagueness on financial matters, until Mr. Sutterthwick inquired with some asperity whether any useful purpose was served by trying to get the witness to say more than she accurately could.

Mr. Dotwell, who could take a hint if it was plain enough, sat down, and the prisoner was informed by the clerk that the time had come for him to put questions to the witness if he desired to do so.

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[1] See 88th ed., 2377.

"Sonia, why have you done this to me?" was Victor Cankwich's first question.

"Do I have to answer that?" said the witness to the magistrate.

"I don't see why not," he replied.

"All right, you can have it," she said to her husband. "Because of what you've done to me."

"What have I done to you, Sonia?" he inquired aggrievedly. "Do I beat you? Did I ever force you to do anything you didn't want to?"

"I didn't say you did," she said.

"I can't see what you're complaining of, then," he pursued. "You're surely not complaining because I haven't interfered in your life, are you?"

"Well, really," said Mr. Sutterthwick, shocked out of his judicial impassivity for the moment. "Do you regard it as 'interference' for a husband to object to his wife being a prostitute?" Then, seeing Frell's reproachful look, he added hastily: "Don't answer that question. Regard it as a rhetorical one—if you understand what that means. The point is that you can't be cross-examined while you're in the dock. . . . Have you any other questions to ask the witness?"

"I can't think of any at the moment, sir. Really, I don't know what it's all about."

"That's your case, I suppose," said the magistrate, turning to Mr. Dotwell.

"There is a police officer I wished to call, sir, who would give evidence of association between the two and that the woman is known to him as a prostitute."

"There doesn't seem any dispute on either of those two points."

"Very well, sir, if you're satisfied, I'll close my case now," said Mr. Dotwell, resignedly, enduring once more the pangs of artistic frustration.

The case for the defence

Victor Cankwich, after some inner deliberation, availed himself of his right to give evidence on oath. In reply to the clerk's preliminary questions he readily supplied the information that his address was the same as Sonia Sibson's, and, rather less readily, that he supposed he was a salesman by occupation, but it was some time since he last worked for an employer.

At this point Mr. Sutterthwick intervened to say: "Now I want you to understand the legal position with regard to the charge against you. If it's proved that a man was living with a prostitute, then the onus is on him to satisfy the court that he wasn't knowingly living on the earnings of prostitution. . . . I gather that you admit living with this woman? "

"Yes, of course, sir. She's my wife."

"And that she is a prostitute? "

"Well, sir, that's her affair. She doesn't interfere in my life, and I don't interfere in hers."

"Very well. If that's your view of the matter, what is your life? What do you do for a living? "

"Well, I do a bit of buying and selling, sir; but mainly I get my money by gambling."

"What sort of gambling? "

"The dogs mainly; but I belong to a gambling club as well, and I go there most nights."

"And do you always win? "

"No, not always, of course. But more often than not."

"And how much do you make a week—or a year, if you like—by your gambling? "

"Oh, I've never worked it out that way, sir. All I know is that I get enough to live on."

"Does your wife ever give you any money? "

"No, sir; never."

"Suppose you had a bad week with your gambling, and were broke? "

"Ah well, she might lend me a bob or two then, but I always pay her back."

"Do you give her any money, apart from paying back loans? "

"If she asks for it and if I've got it, I give her what she wants."

"Who pays the rent? "

"She has to. It's her flat. She was already in it when I married her."

"Who buys the food? "

"We have pretty well all our meals out, sir."

"Well, who pays the bills when you eat out? "

"Sometimes I do; sometimes she does; it's all according to how much money we've both got."

Mr. Sutterthwick sat back and said: "Is there anything else you want to say? "

Victor Cankwich pondered for a moment and then said: "No, I don't think so—except that I've never ill-treated her."

"Do you want to ask him any questions, Mr. Dotwell? " said Mr. Sutterthwick.

Cross-examination

" Yes, sir, there are one or two short matters I should like to put to him," replied the solicitor, ignoring the implications of the magistrate's inflexion. " Do you have an account with any bookmaker? " he went on, turning to the witness.

" No. I go where the prices are best."

" Can you tell us the name of any bookmaker you have betted with? "

" Well, I expect I could think of some of the names they call themselves ; but they wouldn't know me, if that's what you're getting at. I haven't got a regular bookie."

" Do you keep any account of your winnings or losings? "

" No, it's just easy come and easy go—you know how it is with us boys."

" Do you pay income tax? "

The witness made no attempt to conceal his amusement at this question and, until it was repeated, obviously did not consider that a formal answer was necessary.

" Is that all, Mr. Dotwell? " said the magistrate, taking advantage of the pause. But Mr. Dotwell was never satisfied with a lily unless it was gilded.

" What's the name of the gambling club you belong to? " was his next question.

" The Nest."

" Can you tell us the name of any person you've won money from there? "

" Oh yes, plenty. And I could bring them here as witnesses."

" Are any of them here today? "

" No. I haven't had a chance to get them. The police said the warrant wasn't backed for bail and they kept me in all night."

" Is there any record of the amounts you've won from them and the dates when you won those amounts? "

" No, of course not. We don't play that way."

Mr. Sutterthwick becoming increasingly conscious of the passage of time and of the cases still to come before him that morning, felt the need to intervene again. " Do you think any further questions are necessary? " he asked meaningly.

" No, sir ; not if you're satisfied," said Mr. Dotwell, and sat down looking extremely satisfied with himself.

Victor Cankwich returned to the dock and was asked by the clerk whether he had any witness to call.

" Well, the boys from the club will come and tell the truth, if that gentleman wants them," said the prisoner.

"It isn't what he wants that matters. Do *you* want to call any witness?" said Frell.

"No, I don't think it's necessary. I'm not a liar."

Mr. Sutterthwick glanced at some notes he had made and said: "I need only say one thing in giving my decision on the evidence in this case: the defendant hasn't satisfied me that he was not living, at least in part, on the earnings of this prostitute. His own evidence was quite sufficient to justify a conviction. . . . What is known about him?"

Inspector Campting came into the witness-box with a file and said: "The prisoner, your worship, is a married man aged 27. He has one previous finding of guilt for housebreaking as a juvenile, on the . . ."

"I don't think I need to hear about that," said the magistrate. "What about his work record?"

"He doesn't appear to have had any regular employment for the past two years, your worship. That's when he first began to associate with this woman."

"I gather there's no evidence of ill-treatment or coercion?"

"No, your worship. And it is true that the defendant does frequent a certain club in the neighbourhood, but from what the complainant says it appears that he gambles away the money she gives him, rather than winning anything there."

"Have you anything else to say to me?" said Mr. Sutterthwick to the defendant.

"Only that I have won money gambling, that's the God's truth."

Judgment

"Fortunately for you, there's no question of your having made this woman become or continue to be a prostitute," said the magistrate. "In a sense you haven't done much harm, except to yourself. But it's despicable conduct for anyone calling himself a man, and I'm not going to give any encouragement to any idea there may be in the neighbourhood that this is a good way of making a living. The least sentence I can impose on you, in all the circumstances, is three months' imprisonment."

"Keep your chin up, Vic," called a feminine voice from the back of the court. Sergeant Quing hurried towards the source of this disturbance of the court's decorum, but the colourful bevy was already on its way out, its interest in the administration of justice at an end. Sonia Sibson intercepted the warrant officer and spoke urgently with him.

"Excuse me, your worship," he said. "This lady wants to ask permission to see the defendant before he's taken to prison."

"Well," said Mr. Sutterthwick, in some bewilderment. "It's rather odd for the prosecution's principal witness. . . . Still, she is his wife and I suppose there may be some purely domestic matters to be settled. . . . She can see him subject to the usual police supervision."

Five minutes later Sergeant Chumbleton stood watching at a discreet distance while Victor Cankwich and his wife talked earnestly together through a grating in the cell door. Somewhat to the gaoler's surprise the colloquy ended in an impassioned kiss and a "See you again soon, darling," from the woman.

"It'll be two months, at least," he remarked as he led her back through the bare tiled passage.

"Oh no it won't," she said confidently. "He's appealing. I want the forms to fill up, please."

"He's got to do that himself; you can't do it for him," said Sergeant Chumbleton.

"No, but my solicitor can. I'm paying for his defence."

Even a police officer with Sergeant Chumbleton's experience could be shocked sometimes at what people did and said.

"You're going to try and get him off, after all we've done for you?" he said indignantly, and added in vigorous police language the traditional masculine criticism of the ways of women.

"Don't think I've enjoyed having to go through all this nonsense," was the haughty retort. "But can you tell me any other way of getting the law to stop your husband going off with another woman?"

Practice and Procedure

Police Report Sent to the Court of Criminal Appeal by the Court of Trial

On February 25, 1957, the Court of Criminal Appeal (Lord Goddard C.J., Cassels and Gorman JJ.), dismissing an application for leave to appeal in *R.* v. *Williams and Bell,* made the following comments on the practice of sending a police report to the court by the court of trial: The recorder before whom the case was tried had seen fit to send to the Court of Criminal Appeal a detective sergeant's report as the result of inquiries made subsequent to the trial and in respect of certain allegations which were made by one of the applicants against the police. The court sometimes asked for a special report, and sometimes the Home Office asked for a special report, but as a rule it was undesirable that the court of trial should make further inquiries in order to submit a report to the court. Such observations by the court of trial were quite unnecessary and of no assistance to the Court of Criminal Appeal, as that court had to decide upon the evidence given at, and the proceedings before, the court of trial. The practice should not be repeated. [H. P.]

Court for Trial of Charge of Blackmail

In *R.* v. *Hacker,* on February 11, 1957, the Court of Criminal Appeal (Lord Goddard C.J., Cassels and Hinchcliffe JJ.) dismissed an application for leave to appeal from a conviction at quarter sessions of demanding money with menaces contrary to the provisions of section 29 of the Larceny Act, 1916. Lord Goddard C.J. made the following comments regarding the proper court of trial in such a case: The applicant was tried at quarter sessions, having been sent there under the statutory provisions enabling a prisoner to be committed to a more convenient court.[1] It was true that the offence was not one which carried a maximum sentence of life imprisonment, but a case of this gravity, blackmail, ought not to go to quarter sessions. Unless there was some very compelling reason, charges of blackmail ought to be sent to the assizes. [H. P.]

Binding Over to Keep the Peace

See R. *v.* SHARP AND JOHNSON, p. 242, below.

Magistrates' Courts

The issue of a witness warrant against a judgment debtor

Section 73 (1) of the Magistrates' Courts Act, 1952, enacted that " A magistrates' court shall not commit any person to prison or other detention in default of payment of a sum enforceable as a civil debt . . . except by an order made on complaint and on proof " of means to pay. The corresponding provision in the old law—section 35 of the Summary Jurisdiction Act, 1879—did not term the committal of a judgment debtor an order made on complaint, and the relevant form prescribed in the Summary Jurisdiction Rules did not state that the judgment debtor was being either summoned or committed on the complaint of anyone. The change in phraseology made in the consolidating Act renders it possible to justify the issue of a witness warrant against a judgment debtor by arguments which could not previously have been employed. Under the old summary jurisdiction law it was always a very debatable point whether such a proceeding was lawful and, although some courts adopted it, many felt that it was unsafe in view of the prohibition in section 35 (1) of the Act of 1879 against the issue of a warrant of apprehension for a civil debt defendant—even though that prohibition was expressed to be against the issue of such a warrant " for failing to appear to answer any such complaint," which would seem to refer to the complaint necessary to obtain an order for payment of the sum due.

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[1] s. 10 of the Magistrates' Courts Act, 1952.

The corresponding prohibition in the Act of 1952 is contained in section 47 (8), which reads: " A warrant under this section shall not be issued in any proceedings for the recovery or enforcement of a sum recoverable summarily as a civil debt . . ." Now " a warrant under this section " is one issued against a defendant on his non-appearance to a summons, so the existing law is expressly excluding a defendant from liability to arrest on a warrant of that kind but is not worded to exempt him from lawful arrest under a warrant of a different kind.

In civil proceedings a defendant may be called as a witness by the complainant; it follows that he may be summoned in that capacity at the instance of the complainant. Section 77 (1) of the Magistrates' Courts Act authorises the issue of a witness summons both in proceedings on information and on complaint if the court is satisfied that the person in question is likely to be able to give material evidence and will not attend voluntarily as a witness. A judgment debtor is obviously likely to give material evidence because the whole point of issuing a judgment summons against him is to examine him as to his means; and if he does not appear at the hearing of the judgment summons, that, in itself, suggests that he will not attend voluntarily as a witness. If a witness summons is issued against him after his non-appearance to a judgment summons, and he fails to answer this second summons, application may be made against him by the complainant for a warrant under section 77 (3), which authorises this action against a witness who has not appeared to a witness summons, provided the court is satisfied that he has been duly served with the summons and was tendered a reasonable sum for costs and expenses. A warrant issued on such an application in civil debt proceedings would not contravene the prohibition contained in section 47 (8) because it would not be a warrant issued under that section.

A witness warrant could not be issued against a judgment debtor in the first instance, without the prior service of a witness summons; and if the witness summons is to be followed by a witness warrant it must have been accompanied by conduct money when it was served. Apart from these considerations, there seems to have been, in strict law, no other hindrance against the issue of a witness warrant in respect of a judgment debtor since the Act of 1952 came into force. Whether or not this was the intention of Parliament is immaterial if the words on which reliance is placed for authority are clear; but the issue of a witness warrant is a matter in which magistrates may use their discretion, and if, in any particular case, they felt doubts as to the propriety of such a warrant they could refuse to issue it. In many cases it seems contrary to the interests of justice that a debtor should avoid being forced to pay what is due from him simply by staying away from the court and thus preventing evidence being made available which, often, he alone can give. The relevance of this to the criminal law is that, in some criminal proceedings (for example, at the hearing of an appeal at quarter sessions), sums may be ordered to be paid which are recoverable summarily as civil debts.

[A. E. JONES.]

Summary Justice

Drugs

Attempting to export 19 tablets of heroin and being in possession of the tablets; find £80; Seamen: Southampton Magistrates' Court (*Evening Standard,* February 15).

Firearms, explosives and offensive weapons

Firearms. Wife in possession of automatic pistol and ammunition left behind by her seaman husband without firearm certificate; fined £4, pistol and ammunition forfeited; Cole: Liverpool Stipendiary Magistrates' Court (*Liverpool Echo,* February 28).

Food and drugs

Bread. Selling loaves deficient in weight; fined total of £18 on six summonses; W. J. Brookes & Sons, Ltd.: St. Helens Magistrates' Court (*Liverpool Echo,* February 28).

Meat. Butchers marking Argentine meat as "English" and failing to indicate country of origin; fined £122; manager of branch shop fined £22 for aiding and abetting; Layton & Burkett, March: Tottenham Magistrates' Court (*Evening Standard,* February 26).

Meat. Selling meat without displaying a weight ticket or weighing meat in front of a customer; fined £2; Evans: Birmingham Magistrates' Court (*Birmingham Mail,* February 15).

Milk bottle. Failing to make sure a milk bottle was thoroughly clean before use; magistrate satisfied company did everything possible to prevent foreign matter getting into bottles; fined £10, ordered to pay £5 special costs; Wholesale Co-operative Society, Ltd.: West Bromwich Magistrates' Court (*Birmingham Mail,* February 18).

Sweets. Exposing for sale cartons of fruit gums and pastilles to which false trade description had been applied; description "increased weight" likely to lead the public to believe they were getting more sweets for new price of 1s. than they had got for old price of 10½d.; no intention to deceive; fined £50, ordered to pay 10 guineas costs; Rowntree & Co., Ltd.: Dorchester Magistrates' Court (*The Times,* February 19).

Larceny, etc.

Fraudulently using electricity belonging to the Postmaster General; two men made series of telephone calls to each other without paying, one making transferred charge calls to another in telephone box; each fined £5; Scotting, Rasjke: Coventry Magistrates' Court (*Birmingham Mail,* February 21).

Larceny. Stealing 13s. worth of timber from the tidal waters of the Thames, the property of the Receiver of Wrecks; given absolute discharge; Francis: Greenwich Magistrates' Court (*Evening Standard,* February 8).

Road traffic

Bus. Driver failing to take all reasonable precautions to ensure the safety of passengers; passenger thrown over when bus jerked forward; fined £2; Begley: Liverpool Stipendiary Magistrates' Court (*Liverpool Echo,* February 28).

Bus. Tampering with the mechanism of the bus; youth got into cab of waiting bus and touched starter motor; fined £3, ordered to pay 10s. 6d. costs; Walters: Nuneaton Magistrates' Court (*Birmingham Mail,* February 21).

Carrying so many passengers in car that they constituted a danger; ten people in two-seater car, three on front seat, two in space behind, three in tiny dicky seat and one on each running-board; fined £2; Thompson: Derby Magistrates' Court (*Daily Mail,* February 14).

Selling car in such a condition that its use on the road would be unlawful contrary to section 8 (1) of the Road Traffic Act, 1934, as amended by section 7 (1) of the Road Traffic Act, 1956; fined £10, ordered to pay £2 17s. 6d. costs; Hurst Street Garages, Ltd.: Birmingham Stipendiary Magistrates' Court (*Birmingham Mail*, February 13).

Taking and driving away car without the owner's permission; fined £10; Glover: Spalding Magistrates' Court (*Nottingham Evening News*, February 20).

Vagrancy

Failing to stay in reception centre for homeless for minimum of 48 hours; sentenced to one month's imprisonment; Langston: Birmingham Magistrates' Court (*Birmingham Mail*, February 23).

Case and Comment*

Affray—*Elements of offence—no evidence that anyone was put in terror*

R. *v.* SHARP AND JOHNSON [1] (Court of Criminal Appeal: Lord Goddard C.J., Cassels and Hinchcliffe JJ.: February 15, 1957) ([1957] 2 W.L.R. 472; [1957] 1 All E.R. 577).

S. and J. were convicted at the Central Criminal Court of having unlawfully fought and made an affray, and each was sentenced to 12 months' imprisonment. The evidence at the trial was that a police officer had found a large crowd watching S. and J. fighting in a street. They appeared to be exhausted and their faces and clothes were covered in blood, but they were still aiming blows at each other. When the police officer had separated them he found that J. had a severe cut on the head and that S. had a black eye, a cut lip, two teeth knocked out and a badly torn or bitten ear. J. handed to the officer a razor with which he said S. had cut him. S. and J. appealed against their convictions to the Court of Criminal Appeal on a certificate granted by the trial judge on the following grounds:—(1) that there was no evidence upon which the jury could find the appellants guilty in that there was no direct evidence that any person was put in terror (that being an essential constituent of the offence); and (2) that the trial judge was wrong in directing the jury that it did not matter who started the fight or who was to blame for it and that any question of self-defence was not relevant to the charge.

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* Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab.), Barrister-at-Law.

[1] For the appellant Sharp: *Edward Clarke* (instructed by the Registrar, Court of Criminal Appeal). For the appellant Johnson: *Donald Farquharson* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Alastair Morton* (instructed by the Solicitor, Metropolitan Police).

Held, allowing the appeals on the second ground, that on the first ground of appeal it was open to the jury to find that the circumstances amounted to an affray although no person was actually called to say that he was put in terror. There was a remarkable lack of authority on this offence. Coke's opinion, it seemed, was that a combat in public was *ipso facto* an affright and terror to the subjects. Blackstone's opinion that duellers could be indicted for an affray would seem to negative the necessity for direct evidence that someone was put in terror. Hawkins' *Pleas of the Crown* laid down that there might be an affray where there was no actual violence, as by the wearing of unusual or dangerous weapons in public. The case of *Field* v. *Receiver of Metropolitan Police* [1907] 2 K.B. 853 decided that, in the case of riot, at least one person of reasonable firmness and courage must be alarmed, but this court was concerned only with affray, and it might be that this element in *Field's* case might require reconsideration. In the opinion of the court, there was in the present case evidence on which the jury could find that S. and J. were guilty of an affray.

As to the second ground of appeal, both S. and J. had contended at the trial that they had acted in self-defence. The trial judge had directed the jury that it did not matter who started the fight or who was to blame and that no question of self-defence arose. That direction went too far. If two men were found fighting, one must be able to say that the other attacked him and that he was only defending himself; if he was only defending himself there was no fight and consequently no affray. It was inescapable that these matters were for the jury to consider, and the convictions would, therefore, be quashed on that ground.

Both these men had shown themselves to be blemishers of the peace and the members of this court, being justices of the peace for every county, would exercise the powers conferred by the Justices of the Peace Act, 1361. Preventive justice should be exercised in this case, and each of the appellants would, therefore, be ordered to enter into a recognisance and to provide a surety in the sum of £50 to keep the peace and to be of good behaviour for 12 months, and in default to go to prison for 6 months. [H. P.]

COMMENTARY. An affray is a common law misdemeanour punishable with fine and imprisonment at the discretion of the court. It can be committed only in a public place.

The trial judge's direction would have imposed a serious limitation on the right of self-defence. A person assaulted is not confined to warding off blows but may lawfully strike back: *R.* v. *Deana* (1909) 2 Cr.App.R. 75. The infliction of bodily harm or even death is justifiable, provided that it is done in self-defence and no more force is used than is necessary. In *R.* v. *Knock* (1877) 14 Cox 1, Lindley J. pointed out the difficulty of distinguishing self-defence from fighting and said: "The test is this: a man defending himself does not want to fight, and defends himself solely to avoid fighting."

Certiorari—*Application by person not party to proceedings before magistrate.* See R. *v.* THAMES MAGISTRATES' COURT, *ex p.* GREENBAUM, p. 252, below.

Certiorari—*To quash order made twelve years previously.* See *Ex p.* STANTON, p. 249, below.

Conspiracy—*Indictment—conspiracy to acquire metals abroad by unlawful means*

BOARD OF TRADE *v.* OWEN [2-3] (House of Lords: Viscount Simonds, Lords Morton of Henryton, Radcliffe, Tucker and Somervell of Harrow: January 29, 1957) ([1957] 2 W.L.R. 351; [1957] 1 All E.R. 411).

O. and S. were convicted of conspiring in London to defraud an export control department (known as Z.A.K.) of the Federal Republic of Germany by causing Z.A.K. to grant licences to export metals from Germany by fraudulently representing to Z.A.K. that the metals would be supplied to and consumed by Irish manufacturers, well knowing that the metals were in fact to be exported to Russia and that country's satellites. The conviction was quashed by the Court of Criminal Appeal ([1956] Crim.L.R. 829; *sub nom. R.* v. *Owen and Seth-Smith*). On appeal by the Board of Trade pursuant to the fiat of the Attorney-General:—

Held, dismissing the appeal, that a conspiracy to commit a crime abroad is not indictable in this country unless the contemplated crime is one for which an indictment would lie here and it followed that a conspiracy of the nature of that charged in the present case—which was a conspiracy to attain a lawful object by unlawful means, rather than to commit a crime—was not triable

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[2-3] For the appellants: *Sir Reginald Manningham-Buller, Q.C., A.-G., Neville Faulks, David Hurst* (instructed by Solicitor to Board of Trade). For the respondent Owen: *Neil Lawson, Q.C., Sebag Shaw* (instructed by Strikeman & Co.). For the respondent Seth-Smith: *Alexander Karmel, Q.C., Ian Baillieu* (instructed by Galbraith & Best).

in this country, since the unlawful means and the ultimate object were both outside the jurisdiction.

Quaere, whether a conspiracy in this country which is wholly to be carried out abroad may not be indictable here on proof that its performance would produce a public mischief in this country or injure a person here by causing him damage abroad. [J. D. P.]

COMMENTARY. The Attorney-General argued that, since the essence of the crime is the agreement, the place where it was to be carried out was immaterial; and, furthermore, that a conspiracy to defraud was a conspiracy to do an act which was *malum in se* and, as such, clearly criminal in its nature irrespective of locality.

The House took the view, however, that the whole object of the law of conspiracy is the preservation of the Queen's peace within the realm and, therefore, that the locality of the acts to be done and of the object to be attained were not irrelevant to the criminality of the agreement. Their Lordships declined to distinguish between *mala in se* and *mala prohibita*; if such a distinction was to be made for the purpose of conspiracies to commit crimes abroad it should be done by the legislature. No one had ever before been convicted of a conspiracy to commit an act abroad and it was not for the judges to enlarge the boundaries of the criminal law.

It seems that a conspiracy to do an act either within or outside the jurisdiction would be indictable here: *R.* v. *Kohn* (1864) 4 F. & F. 68.

Dogs—*Licence—man boarding dog for its owner*

LANCASTER *v.* WHALLEY [4] (Colne Magistrates' Court: R. J. Walker, Esq., Chairman: January 16, 1957).

The defendant was charged with keeping a dog over the age of six months without having in force a licence authorising him so to do, contrary to section 8 of the Dog Licences Act, 1867. The prosecution adduced evidence that the dog concerned (a greyhound) was caught worrying hens, and was handed to the defendant's wife by a police officer, who later asked the defendant if the dog was his. The defendant replied, "Yes." At that time he could not produce a dog licence, but he later produced one to the police which had been taken out subsequently to the day of the incident. In court the defendant stated that the dog belonged to a man in another town, and that he was boarding it for its owner, as he periodically did with such dogs when they were running. He also said that he usually kept four licences to cover him, particularly for dogs which came from Dublin, but this one had just slipped his mind. The defendant produced a dog licence which was in force at the time of the incident, and which was made out in the name of the person stated by him to be the owner. There was nothing to show that the licence was for this particular dog and not for any other. The defendant agreed in cross-examination that he himself had no dog licence in force at the material time. Section 8 of the Act states that every person in whose custody, charge or possession, or in whose premises any dog shall be found or seen shall be deemed to be the person who shall keep such dog, unless the contrary be proved.

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[4] For the prosecution: Supt. J. A. Lancaster, Lancashire Constabulary. The defendant appeared in person.

Held, the defendant was guilty. He was fined £1.

[W. Whittle, *Clerk to the Justices*.]

COMMENTARY. In the House of Commons it was stated in answer to a question that the law requires any person who keeps a dog to have a licence. It would seem that if the owner of a dog normally houses and feeds it, an agent, servant or gamekeeper would not be required to hold a licence in addition if his custody of the dog were temporary only, but this is a matter for the courts (H.C. Debates, Vol. 563, col. *206*; January 31, 1957).

Evidence—*Corroboration—evidence of children—indecent exposure*

R. *v*. FINNIGAN [5] (Lancashire Quarter Sessions: A. E. Jalland, Esq., Chairman: February 6, 1957).

The accused pleaded not guilty to an offence of indecent exposure. Two boys called by the prosecution, one aged eight and unsworn, the other aged twelve, stated that the accused exposed his person to them while they were playing together in a country lane, and said: "I bet you've got one to show: if you will do the same I will pay you." The mother of one boy said that the boys made a complaint to her to this effect shortly afterwards. Counsel for the defence submitted to the jury that neither boy could corroborate the evidence of the other since corroboration required independent testimony. The offence required exposure to more than one person, and the only direct evidence was given by the two persons alleged to be those to whom the exposure was made. He referred to Archbold, 33rd ed., 1396, and to *R.* v. *Campbell* [1956] Crim.L.R. 553, and submitted that such joint complaint in a case of a sexual offence required corroboration.

The chairman directed the jury that they must find corroboration in order to convict if they relied on the evidence of the boy who was not sworn; that they need not find corroboration if they relied on the evidence of the boy sworn, but that it was most dangerous to convict without it. Corroborative evidence came from the lips of a witness other than the witness whose evidence was to be corroborated.

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[5] For the prosecution: *Mark Carlisle* (instructed by Baldwin, Weeks & Baldwin, Clitheroe. For the defence: *R. Montgomery* (instructed by Mawdsley & Hadfield, Southport).

Counsel for the defence requested that the chairman might direct the jury whether the evidence of either boy could corroborate that of the other where the two boys were the only people alleged to have witnessed the indecent exposure. The chairman declined to give any direction.

The jury returned a verdict of not guilty.

[Peter G. Smith, *Barrister-at-Law*.]

COMMENTARY. Unsworn evidence given by a child of tender years under section 38 (1) of the Children and Young Persons Act, 1933, is required by the statute to be corroborated, and a conviction upon such evidence, if uncorroborated, would be unlawful. It is a rule of practice that the evidence of victims of sexual offences should be corroborated even though they be on oath and whether they be adults or children; but in such a case a conviction upon uncorroborated evidence would not be unlawful and would be sustained by the Court of Criminal Appeal, provided only that a proper caution had been given to the jury by the judge: *R.* v. *Freebody* (1935) 25 Cr.App.R. 69. Evidence given by accomplices of the accused is also required to be corroborated as a matter of practice, and here it is a well-established rule that the evidence of one accomplice cannot corroborate that of another: *R.* v. *Gay* (1909) 2 Cr.App.R. 327. Similarly it is well established that a child who gives unsworn evidence cannot be corroborated by another unsworn child: *R* v. *Manser* (1934) 25 Cr.App.R. 18. The chairman in the present case declined to apply a similar rule to the evidence of two victims of an alleged sexual offence, and that in spite of the fact that the particular offence could be committed only if there were two victims. It is not easy to see on what principle the case of the evidence of two victims of a sexual offence is to be distinguished from that of the evidence of two accomplices; though the case of the evidence of two unsworn children might be distinguished on the ground that the corroboration is there required by law and not merely by practice.

Explosives—*Possession of—knowledge*

R. *v.* HALLAM [6] (Court of Criminal Appeal: Lord Goddard C.J., Stable, Cassels, Gorman, Hinchcliffe JJ.: February 25, 1957) ([1957] 2 W.L.R. 521; [1957] 1 All E.R. 665).

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[6] For the appellant: *Gerald Gardiner, Q.C., Brendan Shaw* (instructed by Wilkinsons). For the Crown: *Sir Harry Hylton-Foster, Q.C., S.-G., J. H. Buzzard* (instructed by the Director of Public Prosecutions).

H. was convicted at the Central Criminal Court of being in possession of explosive substances under section 4 (1) of the Explosive Substances Act, 1883, and was sentenced to three years' imprisonment. Section 4 (1) provides that "any person who . . . knowingly has in his possession . . . any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he . . . does not have it in his possession . . . for a lawful object, shall, unless he can show that he . . . had it in his possession . . . for a lawful object, be guilty of felony." On appeal against conviction to the Court of Criminal Appeal it was contended that the trial judge had misdirected the jury by directing them that it was not necessary for H. to know that the substances in his possession were explosives. It was submitted that the case of *R.* v. *Dacey* (1939) 27 Cr.App.R. 86, on which that direction was based, was wrong because the word "knowingly" in the section governed the words "explosive substance" and not merely the possession of the substance.

Held, dismissing the appeal, that the question for the court was whether "knowingly" meant that the prisoner must not only know that he had some substance in his possession, but also that it was an explosive substance. In *R.* v. *Dacey* the Court of Criminal Appeal had held that it was enough for the prosecution to show that the prisoner had in his possession something that turned out to be explosive provided that there was some evidence of suspicious circumstances. The trial judge, relying on that decision, had directed the jury that in order to convict H. it was not necessary for them to be satisfied that he knew that the articles in his possession were explosives, but that it was enough if he knew that he had articles which in the event were explosives. This court could not take that view. The true meaning of the subsection was that the prisoner must know that the substances were explosive. If the jury were satisfied that the prisoner had a substance in his possession in circumstances giving rise to a reasonable suspicion that it was not for a lawful object, then they could infer that he knew that it was an explosive substance. Such knowledge was a necessary ingredient of the offence. Although there had been a misdirection, there had been no miscarriage of justice and the court would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. The appeal would, therefore, be dismissed. [H. P.]

COMMENTARY. For a full discussion of the use and interpretation of the word "knowingly" in statutes, see Edwards, *Mens Rea in Statutory Offences,* especially Chapter III. The present decision accords with the opinion of Dr. Edwards that "where the wrongful 'act' in a statutory offence, based on the word 'knowingly,' consists of a number of constituent elements the necessity for knowledge extends to *all* the elements of the wrong." As Dr. Edwards illustrates, the courts have not, however, been consistent in their interpretation of the word and have been guided to a large extent by the nature of the offence involved.

False pretences—*Converting thing found.* See McGregor *v.* Benyon, p. 250, below.

Habeas Corpus—*Applicant at liberty*

Ex p. Stanton [7] (Q. B. Divisional Court: Lord Goddard C.J., Cassels and Hinchcliffe JJ.: February 11, 1957) (*The Times*, February 12, 1957).

In 1945 the Home Secretary made an order under section 9 of the Mental Deficiency Act, 1913, sending S. to a mental institution. S. was out on licence from 1952 to 1953 when he left of his own accord. In 1954 he joined the Royal Air Force as a bandsman. The Board of Control now required him to submit himself before the visiting justices at Birmingham. On an application by S. for an order of habeas corpus or, alternatively, an order of certiorari to quash the order made in 1945:—

Held, dismissing the application, that the court could not make an order of habeas corpus when the applicant was at liberty, nor could it give leave to move for certiorari in respect of an order made 12 years ago. [J. D. P.]

Indecent assault — *Mental defective — woman certified under Lunacy Act, 1890*

R. *v.* Bisp [8] (Birmingham Quarter Sessions: J. E. S. Simon, Q.C., Assistant Recorder: January 2, 1957).

B. was charged on indictment with indecent assault on a female contrary to section 52 of the Offences against the Person Act, 1861. The woman in question (who was not called as a witness) was certified under the Lunacy Act, 1890, and was a patient at an institution where B. was employed as a kitchen-hand. The evidence of the sole eye-witness was consistent only with consent on the part of the woman. As the offence charged was indecent assault and not carnal knowledge or attempted carnal knowledge section 324 of the Lunacy Act did not apply, but the prosecution, relying on section 56 (3) of the Mental Deficiency Act, 1913, submitted that the consent of the woman was no defence. The medical evidence was that the woman was not a mental defective within the categories set out in section 1 of the Mental Deficiency Act, 1913, as amended. Counsel for the prosecution argued that a person who was certified under the Lunacy Act as being of unsound mind was necessarily a mental defective within the meaning of the Mental Deficiency Acts; as section 341 of the Lunacy Act, 1890, in its definitions provided that a lunatic meant an " idiot or person of unsound mind " and as an " idiot " was one of the categories set out in the Mental Deficiency Acts the woman could be brought within the protection of the Mental Deficiency Acts and her consent could be no defence.

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[7] For the applicant: *John Platts-Mills* (instructed by Robert K. George).

[8] For the prosecution: *E. Stockdale* (instructed by M. P. Pugh, Birmingham for the Director of Public Prosecutions). For the defence: *A. E. James* (instructed by Alec H. Evans, Birmingham).

Held, that the argument of the prosecution failed. Section 56 (3) of the 1913 Act related solely to mental defectives within the meaning of the Acts and did not apply in the case of persons who were not mental defectives but were certified under the Lunacy Act. The jury were therefore directed to return a verdict of Not Guilty.

[Miss Jean Fisher, *Barrister-at-Law*.]

COMMENTARY. Consent is a defence to a charge of indecent assault except where the victim is under the age of sixteen or where the victim is a defective and the accused knew or had reason to suspect that she was a defective. The law is now consolidated in section 14 of the Sexual Offences Act, 1956, which came into force on January 1, 1957, and which repeals section 52 of the Offences against the Person Act, 1861, and section 56 (3) of the Mental Deficiency Act, 1913. The term " defective " is defined by section 45 of the 1956 Act which replaces the definition in section 1 of the Mental Deficiency Act, 1913, for the purposes of indecent assault and the other sexual offences contained in the 1956 Act.

Indecent Exposure—*Evidence*. See R. *v*. FINNIGAN, p. 246, above.

Indictment—*Conspiracy*. See BOARD OF TRADE *v*. OWEN, p. 244, above.

Larceny—*Larceny by finding—handbag found by child and given to mother*

MCGREGOR *v*. BENYON[9] (West London Magistrates' Court: E. R. Guest, Esq., Metropolitan Magistrate: January 14, 1957).

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[9] For the prosecution: *Oswell Macleay* (instructed by the Solicitor, Metropolitan Police).
For the defence: *Conrad Dehn* (instructed by Oswald, Hanson & Smith).

The defendant was charged with larceny. On November 5, 1956, a handbag was stolen from a Mrs. B. at her shop by an unidentified youth. On December 12, the handbag was found in a garden by the defendant's four-year-old daughter who brought it home and gave it to her mother, the defendant. In the handbag was a booklet containing savings club stamps and bearing Mrs. B.'s name and home address. The defendant looked in the handbag and then put it in a cupboard in her home. On December 21 the defendant, who did not know Mrs. B., went to the latter's shop with the booklet and said: "My friend said, 'may she have the club out?'"; and Mrs. B. thereupon took the booklet together with the defendant's name and address. Counsel for the prosecution stated in opening that his contention was that the defendant was guilty of larceny by finding, and that he was not contending that she was ever a bailee of the handbag or its contents. At the close of the prosecution's case counsel for the defence submitted that there was no case to answer since no one to whom something was given by someone else could be said to have "found" it, and that the court was not bound to take a different view by the *dicta* of Lord Goddard C.J. in *Walters* v. *Lunt* [1951] 2 All E.R. 645, since there was nothing to show (1) that in that case the goods were given to the defendants by their children as distinct from being brought home and found there by the defendants, or (2) that this point was even considered in that case.

The magistrate upheld the submission and dismissed the charge, stating that in his view the defendant should have been charged with attempting to obtain by false pretences.

[Conrad Dehn, *Barrister-at-Law*.]

COMMENTARY. In *Walters v. Lunt* a child aged seven unlawfully took a fairy cycle from the premises of its owner and brought it home. When the cycle was found in the child's home his parents were charged with receiving stolen goods. They were acquitted on the ground that the child, being under eight, could not steal and therefore the goods could not be stolen. In dismissing the prosecution's appeal the Lord Chief Justice said it would be open to the justices, on these facts, to convict the parents either of larceny as bailees or of larceny by finding. This dictum was severely criticised (68 *Law Quarterly Review* 167 and 15 *Modern Law Review* 222) on the ground that on the facts of the case there was no evidence of a bailment nor of a taking from the possession of the prosecutor, which is an essential of larceny by finding. Furthermore, it was said, the two varieties of larceny are mutually exclusive, so that a suggestion that the accused could be convicted of either was necessarily misleading. A further objection to the dictum is that there would seem to have been no evidence of a carrying away or "asportation." See *R.* v. *Thomas* (1953) 37 Cr.App.R. 169 where sheep strayed on to the land of the appellant from an adjoining farm and Stable J. directed that the appellant's finding of the sheep on his land and his failure to return them could amount to larceny. The conviction was quashed on the ground that there was no evidence of an asportation.

In the present case there was an asportation of the booklet, but the other criticisms of *Walters* v. *Lunt* would have been equally applicable to a conviction in this case. It is submitted with respect that the magistrate would have been justified in simply not following the dictum in *Walters* v. *Lunt* but he apparently preferred to distinguish it on the rather subtle ground suggested by counsel.

Local Government—*Street trading licence—appeal against refusal of licence—jurisdiction of magistrate*

R. *v.* THAMES MAGISTRATES' COURT, *ex p.* GREENBAUM [10] (Court of Appeal: Denning, Romer and Parker L.JJ.: January 29, 1957) (*The Times,* January 30, 1957).

Two street traders, A. and B., both wanted a particular pitch in a street in Whitechapel. Both applied to the Stepney Borough Council for a licence for the pitch and the council decided in favour of A. B. appealed to a Metropolitan Magistrate against the refusal of a licence to him and the magistrate found in his favour. At the hearing before the magistrate, although A. gave evidence, he was not a party to the appeal. A. applied to the Divisional Court for an order of certiorari to quash the magistrate's decision, and that court, granting the application, held that the magistrate had no jurisdiction to hear and determine the appeal under section 25 of the London County Council (General Powers) Act, 1947. On appeal to the Court of Appeal by B.:—

Held, dismissing the appeal, (1) that if a street trader was refused a licence he could only appeal to a magistrate from that refusal on specific grounds personal to himself; where there was a contest between traders for a particular pitch, that was a matter entirely for the local council to decide and the magistrate had no jurisdiction; (2) that although A. had not been a party to the proceedings before the magistrate, he was entitled to apply for certiorari, for that remedy was not confined to the parties before the lower court, but extended to any party aggrieved where the lower court had gone beyond its jurisdiction. [J. D. P.]

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[10] For B.: *Neil Lawson, Q.C., L. Belcourt* (instructed by Saunders, Sobell, Greenbury & Leigh). For A.: *Percy Lamb, Q.C., Graham Eyre* (instructed by J. N. Mason & Co.). For the magistrate: *Rodger Winn* (instructed by the Treasury Solicitor).

COMMENTARY. The court was told that the decision in this case would mean a complete alteration of practice in these matters and that the Metropolitan Magistrates had for a long time been assuming that they had jurisdiction in such cases as this. The question, however, was simply one of the construction of the Act, which could not be affected by the practice.

Local Government—*Street trading licence—refusal of licence*

ALLEN *v.* CROYDON CORPORATION [11] (Court of Appeal: Denning, Romer L.JJ., and Lloyd-Jacob J.: February 4, 1957) (*The Times*, February 5, 1957).

In 1954 the appellant, who had taken over a street trading licence from her husband in 1950, employed a full-time assistant, who was left in complete control to run the woman's business on a fruit and vegetable stall in Croydon. The appellant was now fifty-nine years of age and her practice was to be present at the stall when it was set up at 8 a.m., to visit it during the course of the day several times for about ten minutes, and to collect the money at the end of the day. In December, 1955, the Croydon Corporation refused to renew the appellant's licence because she did not personally take any part in conducting the street trading business to which the licence related. Her appeals to the Croydon justices and to the Divisional Court were dismissed. On appeal to the Court of Appeal:—

Held, dismissing the appeal, that it was contrary to the conception of a street trader that one person should hold a licence and put in another as a full-time manager without taking any great part himself; the test was not whether the appellant took a material part in running the stall but whether she was a suitable person to hold a licence; whether she did enough to render her a suitable person was a question of degree which was essentially a matter for the council and the justices and, there being material on which they could find that the appellant was not a suitable person to continue to hold a licence, the court would not interfere.

[J. D. P.]

COMMENTARY. The decision is strictly one of the construction of the Croydon Corporation Act, 1927, but the court seems to have laid down a general principle concerning the conception of street trading. This principle would not preclude a trader from employing an assistant, if his business required it, or from temporarily delegating the management of the business during an illness or holiday.

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[11] For the appellant: *A. Lipfriend* (instructed by O. L. Blyth). For the corporation: *H. J. Leonard* (instructed by Sharpe, Pritchard & Co. for the Town Clerk, Croydon).

London—*Street trading licence.* See R. *v.* THAMES MAGISTRATES' COURT, *ex p.* GREENBAUM, p. 252, above.

Mens Rea—*Possession of explosives.* See R. *v.* HALLAM, p. 247, above.

Probation—*Breach of requirement of order—imposition of further term of probation*

R. *v.* HAVANT JJ., *ex p.* JACOBS [12] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 30, 1957) ([1957] 1 W.L.R. 365; [1957] 1 All E.R. 475).

A girl was put on probation for two years by justices at Poole. After five months she committed a breach of the probation order and came before the magistrates' court at Havant which had become the supervising court for the purpose of the Criminal Justice Act, 1948. The justices made a new probation order for a period of two years. On an application by the girl's mother for an order of certiorari on the ground that the justices had no power to make a new probation order without discharging the previous order and that the effect of making the new order was to extend the period of probation to one of more than three years contrary to section 3 (1) of the Criminal Justice Act, 1948:—

Held, that the justices were entitled under section 6 (3) (*a*) of the Act of 1948 to make a fresh probation order for a period of not more than three years and that order would in future control the probationer, the previous order, although not formally discharged, being then ineffective. The proviso to para. 3 of Sched. 1 to the Act did not apply because that only prohibited the court when asked to amend an existing order from extending the period beyond three years. Accordingly, the justices had power to make the order and the application failed. [J. D. P.]

COMMENTARY. Under section 6 (3) (*a*) of the Criminal Justice Act, 1948, a probationer who has broken a probation order made by a court of summary jurisdiction may be dealt with "in any manner in which the court could deal with him if it had just convicted him of that offence." Under this provision justices can sentence a probationer to prison or send him forward to quarter sessions for sentence. Obviously the probation order could have no effect during a sentence of imprisonment and, the court holds, it will be similarly ineffective, though not formally discharged, if the justices make a new probation order for not more than three years.

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[12] For the applicant: *Ingram Poole, A. R. Tyrrell* (instructed by Barnes & Butler for J. W. Miller & Son, Poole). For the justices: *D. A. Grant* (instructed by Theodore Goddard & Co., for G. Andrew Wheatley, Winchester).

Prostitution—*Living on the earnings of prostitution—room let to prostitute*

R. *v*. THOMAS[13] (Central Criminal Court: Pilcher J.: January 24, 1957).

The defendant was charged with being a male person living wholly or in part on the earnings of prostitution. He pleaded not guilty. Evidence was given that a woman with some fifty-nine convictions for prostitution, had made an arrangement with the defendant whereby she had use of a room each night between 9 p.m. and 2 a.m. For this the woman paid the defendant £3 each night. The defendant knew the woman was a prostitute and the purpose for which she had been using the room. Counsel for the defence, relying on the decision in *R*. v. *Silver* [1956] Crim. L.R. 338, submitted that the arrangement made by the defendant did not amount to living on the earnings of prostitution.

Pilcher J. said that with the greatest respect to Judge Maude, Q.C. he could not agree with his decision in *R*. v. *Silver*. It seemed to him (Pilcher J.) that if a person rented a flat or room at a very inflated rent to a prostitute, for the express purpose of carrying on her trade, then that person could not deny living wholly or in part on the earnings of prostitution. Such a person was in quite a different position to a doctor, or shopkeeper or anyone else who had dealings with a prostitute. Section 1 (1) of the Vagrancy Act, 1898, was the operative section. Subsection (3) merely laid down that in certain circumstances where it was difficult to prove that a man was living on immoral earnings the law would deem that he was so living unless he proved that he was not.

The jury found the accused guilty. He was sentenced to twelve months' imprisonment.

[A. E. Munir, *Barrister-at-Law*.]

COMMENTARY. The present case is in direct conflict with *R*. v. *Silver* where the accused had let flats to prostitutes at very inflated rents for the express purpose of enabling them to carry on their trade. Judge Maude accepted the argument that the landlord who takes an excessive rent from a prostitute is in the same position as a doctor, barrister or estate agent who performs services for her knowing she is a prostitute or as a shopkeeper who grossly overcharges her because she is a prostitute. Pilcher J. seems to have distinguished these examples and his decision may be supported by analogy to the law of contract. It seems that one who renders ordinary services, such as laundering clothes, or one who supplies ordinary goods may recover the price, notwithstanding the fact that the prostitute could not carry on her trade without the services or goods: *Lloyd* v. *Johnson* (1798) 1 Bos. & P. 340; *Bowry* v. *Bennet* (1808) 1 Camp. 348. If this were not so the prostitute would have great difficulty in procuring essential goods and services. The persons supplying such goods and services clearly could not be held guilty of living on the earnings of prostitution even though they knew of their customer's trade. But where the goods or services are supplied for the express purpose of furthering the prostitute's trade, the supplier cannot recover: *Pearce* v. *Brooks* (1866) L.R. 1 Exch. 213, where it was held that the plaintiffs could not recover instalments due under a hire-purchase contract for an ornamental brougham which, as the plaintiffs knew, was to be used by the defendant, a prostitute, as part of her display to attract men. In the present case it was obvious that the rooms were let for the express purpose of carrying on prostitution. The case was like *Pearce* v. *Brooks* rather than *Lloyd* v. *Johnson*. Could a person in the position of the plaintiff in *Pearce* v. *Brooks* be convicted of living on the earnings of prostitution?

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[13] For the prosecution: *Victor Durand* (instructed by the solicitor to the Metropolitan Police). For the defence: *H. S. Grannum* (instructed by Nehra, Emerson, Naylor & Co.).

Road Traffic—*Driving under the influence of a drug—insulin*

ARMSTRONG *v.* CLARK [14] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 30, 1957) ([1957] 2 W.L.R. 400; [1957] 1 All E.R. 433).

C., a chemist, who was suffering from diabetes, took his usual quantity of insulin by injection and, having consumed a regulated meal, drove his car about two miles. He was discovered some two hours afterwards at the wheel of the car in a semi-conscious state and was later found to be in a hypoglycaemic coma due to over-action of the insulin he had taken. On a charge of driving a car when under the influence of a drug contrary to section 15 (1) of the Road Traffic Act, 1930, the justices were of opinion that insulin was not a drug within the meaning of the section and dismissed the information. On appeal:—

Held, allowing the appeal, that a drug being a medicament which was given to cure, alleviate or assist an ailing body, insulin was clearly a drug within the meaning of the Act and, therefore, the defendant was guilty of an offence. [J. D. P.]

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[14] For the prosecution: *Roger Parker, Patrick Neill* (instructed by Gregory, Rowcliffe & Co. for Hugh Carswell, Chester). For the defendant: *Gerald Howard, Q.C., J. W. Da Cunha* (instructed by Charles Russell & Co. for Skelton & Co., Manchester).

COMMENTARY. The Lord Chief Justice described a drug as "a medicament or medicine, something given to cure, alleviate or assist an ailing body." Insulin plainly came within such a definition. The section was designed for the protection of the public and people who are liable to go into comas are a danger to other road users.

An article in *The Times*, February 1, 1957, points out that the decision may have serious consequences: "Of the hundreds of thousands of diabetics in the country thousands are car drivers, and several hundreds of these are doctors in active practice." It seems that because the body's need for insulin varies from time to time, it is inevitable that diabetics should occasionally take more insulin than they require, which results in the condition of hypoglycaemia. This can usually be remedied by taking some glucose or sugar, of which, according to the secretary of the British Diabetic Association, the wise diabetic always carries a supply in his car against the over-action of insulin.

Merely being under the influence of insulin while in charge of a car is not in itself an offence; the accused must be "under the influence . . . to such an extent as to be incapable of having proper control of the vehicle." The diabetic who can properly regulate his supply of insulin may therefore drive without committing an offence.

Road Traffic—*Farmer's goods vehicle—vehicle used to transport furniture of agricultural labourer*

ARMITAGE *v.* MOUNTAIN [15] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 28, 1957).

Farmers who owned a motor-lorry, which they had licensed as a farmer's goods vehicle at the appropriate rate of duty under the Vehicles (Excise) Act, 1949, used it to transport furniture belonging to an agricultural labourer whom they had recently engaged to work for them to the farm cottage which he was to occupy. The farmers were charged under section 13 of the Vehicles (Excise) Act, 1949, with unlawfully using the lorry on a public road for a purpose which brought it within a class of vehicle to which a higher rate of duty was chargeable under the Act. The justices found that the farmers were under no contractual obligation to convey the furniture nor was any payment made or demanded for its carriage. They were of opinion that the lorry was not being used for, or in connection with, the farmer's trade or business, and consequently, by virtue of section 7 (2) (*a*) of the Finance Act, 1952, was not to be treated as a "goods vehicle" for the purposes of the Vehicles (Excise) Act, 1949. They held accordingly that the farmers had not committed the offence charged and dismissed the information. On appeal by the prosecutor:—

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[15] For the appellant: *Rodger Winn* (instructed by the Treasury Solicitor). The respondent did not appear and was not represented.

Held, that the furniture was not being carried for hire or reward and its use for the carriage of the furniture out of kindness to the farm labourer was too remote to be regarded as use of the vehicle in connection with the farmers' trade or business, and therefore the use of the vehicle came within the exception in section 7 (2) (*a*) of the Finance Act, 1952, the justices were right in their decision and the appeal must be dismissed.

[Reported by Mrs. E. M. Wellwood, *Barrister-at-Law.*]

Unlawful wounding—*Verdict of unlawful wounding on charge of wounding with intent to cause grievous bodily harm*

R. *v*. ROSSI, BLYTHE AND DENNIS [16] (Court of Criminal Appeal: Lord Goddard C.J., Lynskey and Hinchcliffe JJ.: January 28, 1957) (*The Times,* January 29, 1957).

R., B. and D. were tried at the Central Criminal Court on a charge of wounding one Comer with intent to cause him grievous bodily harm. The jury, after a retirement lasting three and a half hours, brought in a verdict of unlawful wounding. On application to the Court of Criminal Appeal for leave to appeal against conviction, it was contended that this was a case where the verdict ought to have been guilty of the full offence or not guilty of any offence. The case had been put forward by the prosecution as a violent and murderous assault by a gang of men of which the applicants were members, and the case was fought on the basis of wounding with intent or nothing. The verdict of unlawful wounding was not a possible one having regard to the evidence and was a compromise verdict. The case of *R*. v. *Flood* (1914) 10 Cr.App.R. 227 supported the contention that compromise verdicts had always been condemned by this court. The present case was not one of unlawful wounding at all and the learned judge at the trial was wrong to leave that offence to the jury.

Held, refusing the applications, that where there was a charge of wounding with intent, the Offences against the Person Act, 1861, provided that the prisoner might be convicted of the lesser offence of unlawful wounding. The case of *R*. v. *Flood* was in a different category because there was no such statute applicable to that case.

Per Lord Goddard C.J. (during argument): If this was a case of wounding at all, he (his Lordship) would have thought that the verdict would have been for the full offence. But the jury might have decided that the applicants were guilty but, having regard to the character of the prosecutor, refused to convict them except of the less serious offence. [H. P.]

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[16] For the applicants: *G. D. Roberts, Q.C., James Burge* (instructed by Bellamy, Bestford & Co.).

COMMENTARY. In *R.* v. *Flood* the accused was charged on three counts with aggravated assaults and on a fourth count with a common assault. The evidence adduced by the prosecution that an aggravated assault had taken place was unassailed, the defence being an alibi. The jury found the accused guilty of common assault. The court held that the verdict was quite out of keeping with the facts proved and must have been a compromise verdict. The conviction was quashed. It is not easy to see that a compromise verdict is any the less objectionable because it is given in pursuance of a statutory provision. There is an obvious risk of a compromise verdict where the jury find difficulty in agreeing and are exhorted by the judge into trying to achieve unanimity. See Glanville Williams, *The Proof of Guilt,* 248 *et seq.*; Devlin J., *Trial by Jury,* 48 *et seq.* In the present case the jury, after a retirement of two hours, told Cassels J. that they had explored every avenue and had not reached agreement. The judge sent them back again and they returned their verdict after a further hour and a half.

*Acts and Orders**

Animals

EXPORTED CATTLE PROTECTION ORDER, 1957 (S.I. No. 170): operative February 26, 1957. Any cattle which are to be exported from Great Britain to any place outside the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland, whether by sea or by air, are required to be rested for at least ten hours before they are loaded in the ship or aircraft in which they are to be carried. Adequate food and water, and, in winter, shelter and bedding, must be provided, and an inspector appointed by the Minister of Agriculture, Fisheries and Food or by the local authority, is empowered to prohibit the carriage of any animal or to require any animal to be removed from the ship or aircraft if it is likely to be exposed to unnecessary suffering during transit.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

TUBERCULOSIS (ERADICATION AREA) ORDERS, 1957: NORTH OF SCOTLAND (S.I. No. 251); NORTH WALES (S.I. No. 257); SOUTHERN ENGLAND (S.I. No. 258); YORKSHIRE (S.I. No. 259): all operative March 1, 1957. These four Orders are made under section 5 of the Diseases of Animals Act, 1950, declaring the various areas described therein to be Eradication Areas for purposes connected with the control of tuberculosis as from March 1, 1957. The areas are, from that date, subject to the provisions of the Tuberculosis (Area Eradication) Order, 1950 (S.I. 1950, No. 2006) as amended by the Tuberculosis (Area Eradication) Amendment Orders, 1954 and 1955 (S.I. 1954, No. 762, and S.I. 1955, No. 1449; see [1954] Crim. L.R. 635, and [1955] Crim.L.R. 718), which provisions include, amongst other things, a prohibition against movement of cattle into such an area except under licence or on certain transit journeys.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

Approved Schools

Contributions by local authorities: see p. 261, below.

Armed Forces

VISITING FORCES ACT (APPLICATION TO COLONIES) (AMENDMENT) ORDER, 1957 (S.I. No. 103): operative January 24, 1957. Section 13 of the Visiting Forces Act, 1952 (as amended by sections 2 and 5 (2) of the Revision of the Army and Air Force Acts (Transitional Provisions) Act, 1955) is adapted in its application to the colonial territories specified in the First Schedule to the principal Order (S.I. 1954, No. 636; [1954] Crim.L.R. 558). Section 3 (3) (*a*) of the Act is also modified in its application to Singapore.

British Commonwealth

GHANA (CONSTITUTION) ORDER IN COUNCIL, 1957 (S.I. No. 277): operative in part on February 23, 1957, and as to the remainder on March 6, 1957. Provision is made for a constitution for Ghana (formerly the Gold Coast) upon its attainment of independence within the British Commonwealth of Nations in pursuance of the Ghana Independence Act, 1957. Provision is made with regard to the initiation, conduct, and discontinuance of prosecutions for certain criminal offences by the Attorney-General (r. 15); the qualification and disqualification for election as a Member of Parliament (rr. 24, 25 and 26); and for the penalties for sitting or voting as an unqualified member (r. 29); the constitution of the judicature (rr. 54, 55, 56 and 57); the establishment of a Police Relations Committee in order to encourage good relations between the Police Force and the public (r. 86); and the adaptation and general saving of existing laws (rr. 79, 80 and 81).

FUGITIVE OFFENDERS ACT, 1881 (APPLICATION) ORDER, 1957 (S.I. No. 234): operative February 22, 1957. The Fugitive

Offenders Act, 1881, is applied to the Malay States forming part of the Federation of Malaya, and to Brunei.

SIERRA LEONE (LEGISLATIVE COUNCIL) (INTERPRETATION) ORDER IN COUNCIL, 1957 (S.I. No. 98): operative January 30, 1957. The date on which the Governor of Sierra Leone must dissolve the Legislative Council of Sierra Leone, under rule 29 of the Order of 1951 (S.I. 1951, No. 611) is postponed from January 31, 1957, to July 31, 1957.

Armed forces: see p. 260, above.

Civil aviation: see below.

Children and Young Persons

APPROVED SCHOOLS (CONTRIBUTIONS BY LOCAL AUTHORITIES) REGULATIONS, 1957 (S.I. No. 163): operative April 1, 1957. The 1955 Regulations (S.I. 1955, No. 253; [1955] Crim.L.R. 257) are revoked and replaced. The contributions which are payable in certain circumstances by a local authority to the expenses of the managers of an approved school are raised from the present rate of eighty shillings and sixpence a week to five pounds one shilling and sixpence a week.

Civil Aviation

COLONIAL AIR NAVIGATION (AMENDMENT) ORDER, 1957 (S.I. No. 99): operative March 1, 1957. The 1955 Order is amended with regard to smoking in aircraft (art. 42), the carriage of persons on parts of aircraft or attachments thereto (art. 45), and the aerodromes to be used by passenger-carrying aircraft. The minimum height at which aircraft may fly over a congested area of a city, town or settlement is increased, and there are new provisions applicable to helicopters (r. 15 of Sched. II); there is provision for increasing the range of visibility and distance from cloud necessary for flight complying with the Visual Flight Rules (r. 29 of Sched. II, and for more widespread filing of flight plans (r. 34 of Sched. II). Other amendments deal with the rules applicable to the movement of aeroplanes and vehicles on the manoeuvring areas of land aerodromes, and the showing of lights by aircraft flying at night to facilitate the detection of aircraft at considerable distances.

For penalties for contraventions, see article 69 of the Order of 1955.

Customs and Excise

EXPORT OF GOODS (NORTH KOREA) (REVOCATION) ORDER, 1957 (S.I. No. 246); operative March 4, 1957. The Order of 1950 (S.I. No. 1117), which contains an absolute prohibition on the export of all goods to North Korea is revoked. In future the export of all goods to North Korea will be subject to licence under the Export of Goods (Control) (Consolidation) Order, 1956 (S.I. 1956, No. 1702; [1957] Crim.L.R. 64).

For penalties for contraventions, see section 3 of the Import, Export and Customs Powers (Defence) Act, 1939.

EXPORT OF GOODS (CONTROL) (AMENDMENT NO. 3) ORDER, 1957 (S.I. No. 247); operative March 4, 1957. The Order of 1956 (S.I. No. 1702; [1957] Crim.L.R. 64) is amended. The principal amendments are as follows:—(1) The export of goods to North Korea is prohibited except under licence. (2) Licences are no longer required for the export of certain deep hole drilling machines and specified textile machinery and plant, except for exports to (a) China, North Korea, North Viet Nam and Tibet, and (b) Macao. (3) Licences are required for the export to all destinations other than those specified in paragraph (a) of article 5 of the principal order of boron minerals, metal, alloys and compounds, polymethyl alpha-chloroacrylate in specified forms, specified apparatus used for making telecommunication cables, certain internal grinding machines, certain machine tool parts, accessories and associated apparatus, rotary vibratory hose of rubber, specified crystals and certain X-ray tubes. (4) The regulations governing gift parcels have been amended to prohibit further specified scientific instruments and apparatus being sent as gifts.

In addition, the item relating to chemical and petroleum plant and equipment in Group 6 (4) of the First Schedule to the principal Order has been set out anew in order to correct a minor error.

For penalties for contraventions, see section 3 of the Import, Export and Customs Powers (Defence) Act, 1939.

Education

EDUCATION ACT, 1944 (COMMENCEMENT OF PART III) ORDER, 1957 (S.I. No. 96): operative January 24, 1957. Part III of the Education Act, 1944, which relates to independent schools, is to come into operation on September 30, 1957.

EDUCATION (SCOTLAND) ACT, 1946 (COMMENCEMENT NO. 3) ORDER, 1957 (S.I. No. 224): operative March 1, 1957. Part V of the Education (Scotland) Act, 1946, which relates to independent schools, comes into operation on September 1, 1957.

London

The following Orders have been made detailing prescribed routes: S.I. Nos. 126 (Holborn); 188 (Chislehurst and Sidcup); 189 (St. Pancras); 190 and 256 (Westminster); 215 (Deptford) (No. 2); 216 (Greenwich); 217 (Hayes and Harlington); 218 (Lambeth); 219 (St. Marylebone); 220 (Woolwich); 254 (Bermondsey and Southwark); 255 (St. Marylebone and Paddington).

The following Order has been made prohibiting waiting: S.I. No. 236 (Beaconsfield).

Magistrates: see below.

Magistrates' Courts

JUSTICES ALLOWANCES REGULATIONS, 1957 (S.I. No. 197): operative February 15, 1957. Travelling allowances payable to justices of the peace under section 8 of the Justices of the Peace Act, 1949, are temporarily increased while there is an increase in the fuel tax.

COUNTY OF LONDON JUSTICES (JURISDICTION) ORDER, 1957 (S.I. No. 211): operative March 1, 1957. The classes of case which justices acting for any petty sessional division of the county of London (not being metropolitan stipendiary magistrates) may take are specified.

Rivers

WEST KENT (PREVENTION OF POLLUTION) (REPEAL OF ENACTMENTS) ORDER, 1957 (S.I. No. 143): operative February 11, 1957. The following provisions of the West Kent Main Sewerage Act, 1875, are repealed under the provisions of the Rivers (Prevention of Pollution) Act, 1951:—section 56 (prohibition of sending sewerage newly into rivers); section 57 (notice for discontinuance of existing sewerage works); section 58 (proceedings on non-compliance with notice).

Road Traffic

PUBLIC SERVICE VEHICLES (LICENCES AND CERTIFICATES) (AMENDMENT) REGULATIONS, 1957 (S.I. No. 123): operative February 1, 1957. The 1952 Regulations (S.I. No. 900) are amended. Provision is made prescribing the time and manner in which appeals may be made against the refusal of the Traffic Commissioners to vary the conditions attached to a road service licence or backing, and for the publication in Notices and Proceedings of decisions to refuse to vary conditions (reg. 3 (3) and (5)). Provision is also made for the variation of conditions to have effect, if the holder of the licence or backing so desires, pending such time as his appeal against the variation is disposed of (reg: 3 (5)). The Commissioners are now to give notice of applications made by the holders of road service licences or backings for the variation of the conditions attached thereto (reg. 3 (7)). There are also various minor amendments.

TRAFFIC SIGNS REGULATIONS AND GENERAL DIRECTIONS, 1957 (S.I. No. 13): operative March 1, 1957. Part I re-enacts with amendments the Traffic Signs (Size, Colour and Type) Regulations, 1950 (S.I. No. 953). Apart from the inclusion of a number of signs not previously prescribed for general use, the main changes between the Regulations in Part I and those now revoked are:—(1) Regulation 5 applies section 49 of the Road Traffic Act, 1930 (which makes it an offence to fail to conform to the indication given by certain traffic signs), to certain signs. (2) Regulation 18 requires that the "Halt at Major Road Ahead" sign, shown by the diagram in the First Schedule shall, after March 1, 1958, be illuminated by the fitting of a means of lighting unless illuminated by reflection or reflecting material. (3) Regulations 21 and 22 and the Second Schedule prescribe in greater detail the size, colour and type of signs consisting of lines or marks which may be placed on the carriageway of a road.

Part II re-enacts with amendments the Traffic Signs (General) Directions, 1950, and contains general directions subject to which a highway authority may place on or near any road within its area the signs prescribed in Part I. These directions now apply to certain of the new signs prescribed in Part I.

ROAD TRAFFIC ACT, 1956 (COMMENCEMENT NO. 4) ORDER, 1957 (S.I. No. 185): operative February 8, 1957. The following provisions of the Road Traffic Act, 1956 ([1956] Crim.L.R. 608, 673 and 758) came into operation on March 1, 1957:

S. 4 (6) in part (speed limits in built-up areas).

Sched. 8, para. 34 (except 34 (6)) (minor amendments).

Sched. 9 in part (repeals).

The following provisions of the Act came into operation on April 1, 1957:

S. 42 (protective helmets for motor-cyclists).

Sched. 7 (supplementary provisions in connection with offences under section 42).

The following provisions come into operation on July 1, 1957:

S. 4 (2) (8) (9) and (10) (amendments as to speed-limit in built-up areas.

Sched. 9 in part (repeals).

Conveyance of petroleum: see below.

Scotland

Animals: see p. 259, above.

Education: see p. 262, above.

Supplies and Services

CONTROL OF GOODS (IMPORT CERTIFICATES) (AMENDMENT) ORDER, 1957 (S.I. No. 142): operative February 7, 1957. The form of import certificate set out in the Schedule to the principal Order (S.I. 1951, No. 1016) is amended.

Transport

PETROLEUM-SPIRIT (CONVEYANCE BY ROAD) REGULATIONS, 1957 (S.I. No. 191): operative July 1, 1957. The Petroleum-Spirit (Conveyance) Regulations, 1939–1953 (S.I. 1939 No. 1209; 1947 No. 1593; 1948 No. 1758; 1949 No. 1949; 1950 No. 140; 1953 No. 1362) are revoked and re-enacted in consolidated form with various amendments. The principal amendment is the inclusion of regulation 16, the provisions of which are new and relate to the precautions to be taken in connection with the delivery of petroleum-spirit from a tank wagon or tank trailer into a storage tank.

The definition of "petroleum-spirit" in regulation 28 (1) (f) makes it clear that the Regulations apply to mixtures of petroleum as defined in the Petroleum (Mixtures) Order, 1929 (S.I. 1929, No. 993), as well as to petroleum-spirit.

For penalties for contraventions see section 6 of the Petroleum (Consolidation) Act, 1928.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

27. *Pecuniary interest of local councillor*

(1) The Urban District Council are divided as to whether or not they should grant planning permission for the extension of certain garage premises. The garage is a private limited company the large majority shareholding in which is owned by its managing director.

Councillor T, who is the brother-in-law of this managing director, speaks and votes in favour of the application both in committee and open Council.

(2) The local Chamber of Trade apply to their local Urban District Council for permission to hold a trade week in order to encourage custom to the town, the finale of which is to be a dance, held in the Town Hall, which will raise sufficient money to pay for the expenses of the week. There is keen competition from various other bodies to book the Town Hall on the date required by the Chamber of Trade; and the Council are divided as to whether or not to let the Town Hall to the Chamber of Trade or to one of the various other applicants.

Councillor H, is the chairman of the local Chamber of Trade and is on the organising committee for the trade week. At the open Council meeting he votes in favour of letting the Hall to his Chamber of Trade.

In each of these cases were the councillors in question voting properly, or did they have a sufficient pecuniary interest, direct or indirect, to render their votes illegal? [M. D.]

ANSWER

(1) An "interest" under section 76 of the Local Government Act, 1933, must be "pecuniary"—it must "be something more than a sentimental interest, such as arises from the natural love and affection of a man for his son": *per* Salter J. in *England* v. *Inglis* [1920]

2 K.B. 636, 639, decided on the earlier legislation. In my opinion if T has no financial interest in the company, he has no "interest" under section 76.

(2) H has not, in my opinion, an interest within section 76 unless he draws a salary as chairman of the Chamber of Trade. Any interest he may have by reason of any subscription he may have to pay would, I think, be too remote to be caught by the section.

The consequences of disobeying section 76 where it applies are set out in section 76 (6): it is by no means clear that the vote (if given) of an "interested" councillor is invalid, although this may be the case (see Lumley's *Public Health*, 12th ed., Vol. 11, p. 1727). [J. F. G.]

28. *Embezzlement or larceny by a servant*?

A is a coal merchant and regularly employs B and C as motor drivers to deliver coal to his customers. B and C are paid a regular wage by A and perform their duties in accordance with A's orders, part of their duties being to collect an amount of money from each customer for coal delivered.

B, during the course of his employment, collects £30 from customers, but is then taken ill and returns to his home taking this money with him. His employer A is notified of this and he instructs C to collect this money from B and to return to his office with the money. C collects the £30 from B and then absconds, taking the £30 with him.

I am of the opinion that the offence disclosed is one of embezzlement by C, as the £30 has at no time passed into the possession of the employer A. My colleagues differ with me on this, and state that the offence is one of larceny as a servant by C, as from the time he collects the money from B, the £30 has passed into the possession of the employer A.

I can find no parallel case to compare with this and would be glad of your opinion. [G. V. P.]

ANSWER

The offence disclosed here is quite clearly embezzlement by C because the money at no time passed into the possession of the employer. In *R.* v. *Masters* (1848) 1 Den. 332 money was paid by a customer to servant X, who passed it on to servant Y, who passed it on to servant Z who misappropriated it. It was held by all the judges that this was embezzlement and not larceny.

[D. W. E.]

29. *Prosecutions under the game laws*

I was responsible for reporting a serious case of poaching, resulting in two men being summoned under the following statutes: (1) Poaching Prevention Act, 1862, s. 2; (2) Game Act, 1831, s. 3; (3) Game Act, 1831, s. 23 and (4) the Gun Licence Act, 1870, s. 7.

They appeared before the local magistrates five months after the date of offence. The police prosecutor informed the justices that he was obliged to withdraw the summonses under sections 3 and 23 of the Game Act, 1831, as proceedings had not been commenced within the statutory three months. The reason he gave for the delay in starting proceedings was that the local authority had taken a long time before giving permission to prosecute. The defendants were convicted for offences (1) and (4).

I maintain that, if it was the original intention of the police to prosecute under the Game Act, 1831, proceedings could have been instituted within three months without having to consult the local authority.

If proceedings were to be taken under the Game Licences Act, 1860, then the permission of the local authority would have to be obtained, but, this statute allows a time limit of six months, which would have sufficed in this case.

A certain handbook on game laws suggests that police proceedings should normally take place under the Game Licences Act, 1860, and that the 1831 Act should be resorted to in the event of the local authority refusing to allow prosecution.

To avoid any delay, and also having to consult the local authority, is it not better for proceedings to be taken under the 1831 Act? It appears to me that the result on conviction will be similar in both cases, and therefore the 1860 Act should be considered lastly. [D. G. T.]

ANSWER

It is, of course, perfectly true that offences like taking game without a certificate can be dealt with either under the Game Act, 1831, or under the Game Licences Act, 1860, or, indeed, under both. But which Act should be selected is a matter entirely for decision by the Chief Constable; he would reflect, for example, on the advantage of the 1831 Act, which is that he need not seek permission from the local authority before prosecution, and on its disadvantages, which are that the penalty is only £5 and the proceedings must start within three months (under the 1860 Act, the penalty is £20, and the time limit may be six months: see Stone, 88th ed., p. 1024, note (*s*)).

But surely, in the circumstances narrated by the questioner, this is not really the point. As he points out, the 1831 Act was chosen and the local authority could be ignored, not only for the section 3 offence (taking game out of season) and the section 23 offence (taking game without a certificate), but also for the Poaching Prevention Act, 1862, offence. If proceedings had gone forward at the normal speed only for these three offences (within the three months prescribed by the 1831 Act) no doubt satisfactory convictions could have been secured. But it was the inclusion of an offence under the Gun Licence Act, 1870, which necessitated reference to the local authority, and the consequent delay which ruled out the offence under the 1831 Act; for the Gun Licence Act is a revenue Act and proceedings under it (excepting under section 9) can only be undertaken properly with the consent of the local authority.

From the practical point of view, therefore, we are inclined to think that the best way of dealing with the situation would have been for police to lay the informations for the offences under the Poaching Prevention Act, 1862, and the Game Act, 1831, within the requisite three months, and to fix a date of hearing reasonably far ahead, and then to notify the local authority that these offences were to be tried at the date fixed and that an offence under the Gun Licence Act, 1870, had also been disclosed, which could be dealt with on the same date if they wished. If then they had been dilatory in giving authority to prosecute, it would not affect the prosecutions for other offences. The revenue offence could be taken separately at a later date, or, if the defendant wished, a remand could be asked for in respect of the first three offences, so that all four could be dealt with on the same date. The error, if error there was, lay in holding up the informations for the Game Act, 1831, offences, pending decision by the local authority on the Gun Licence Act, 1870, offences. [N. W.]

Letters to the Editor

Substitution of Sentence by the Court of Criminal Appeal

Sir,

With reference to the letter at [1957] Crim.L.R. 206 and the comment which follows, while it is true that under section 2 of the Larceny Act, 1916, the maximum penalty for the offence of simple larceny is five years' imprisonment, there is power under section 37 of the same Act to impose a maximum sentence of ten years' imprisonment if the offender has been previously convicted of felony, or of seven years if the previous conviction relates to certain specified misdemeanours.

As Evans had qualified for a sentence of preventive detention he had, almost certainly, made himself eligible for the heavier sentence prescribed by section 37.

The previous convictions which had earned the qualification for preventive detention, in spite of the defective notice, were presumably admitted by Evans when he was before the Quarter Sessions Appeal Court. He was before that court, in effect, as if he had just been convicted on indictment and there might thus be grounds to justify a sentence of imprisonment in excess of five years. If there were any doubt as to the powers of the Quarter Sessions Appeal Court, in view of the defective notice, the power vested in the Court of Criminal Appeal to impose a sentence warranted in law would seem to cover the term of eight years' imprisonment imposed in substitution for the sentence of preventive detention.

That the Court of Criminal Appeal had the charge of attempted false pretences in mind is (unless for the purpose of imposing consecutive sentences) unlikely because of the effect of *R.* v. *Pearce* (1952) 36 Cr.App.R. 149. Prior to the decision in that case there was no limit to the term of imprisonment which might be imposed for any attempt which was a common law misdemeanour, but now the punishment for such an offence must not be greater than that which may be given for the full offence. False pretences, under section 32 of the Larceny Act, 1916, is punishable, as is simple larceny, by a term of five years' imprisonment.

Yours faithfully,
R. W. J. NORTON.

Exeter

[We have received a number of other letters making the same point, including letters from Mr. C. Crabtree, Mr. J. King, Mr. E. J. Williams, Detective-Constable A. T. J. Hoare, Detective-Constable Dennis Read and Inspector F. W. Sawford.—EDS.]

Books and Periodicals

Reviews:

Practical Forensic Medicine. By Francis E. Camps, M.D., Reader in Forensic Medicine (University of London) at the London Hospital Medical College, and W. B. Purchase, C.B.E., M.C., M.B., D.P.M., H.M. Coroner for the Royal Household and the County of London, Lecturer in Forensic Medicine at the University of London, Lecturer in Criminal Law, Royal Naval College, Greenwich. London: Hutchinson's Medical Publications, Ltd. 1956. xviii and 491 and (appendices) 33 pp. (£3 15s. net.)

There are already available several well-established books on forensic medicine. The present volume deals with the more practical aspect of the subject, which is only dealt with to a limited extent in existing works.

There is a small number of medical men who have specialised in forensic medicine, but these can only cope with a very limited number of cases which may have forensic possibilities. In fact, any hospital pathologist, or even any doctor, may find himself faced with problems of a forensic character. Hence the present volume should have a wide appeal not only to the medical practitioner but also to the legal profession—particularly those who may be called upon to deal with medical problems in the courts.

The volume is divided into two main sections—Part I. Forensic Medicine; Part II. Toxicology; followed by Part III containing 11 appendices. The subjects are dealt with in alphabetical order and the usual index is omitted.

Certain subjects, such as anaesthetics and respiratory physiology, anatomy and embryology, dental anatomy and pathology, drowning, and treatment of mental patients, include contributions by specialists.

A very commendable feature is the medico-legal information, which is partly dealt with in special sections and partly as medico-legal advice in the more medical sections.

Another feature is the recommendation relating to collection, preservation and packing of materials for further examination in the laboratories. The subject-matter, ranging from abortion to wounds, deals with cases most likely to be encountered. A type of problem likely to confront many medical practitioners relates to alcoholic intoxication and the chapter dealing with this problem should be particularly useful to the ordinary G.P.

The section on toxicology is not intended to be a comprehensive treatment of the subject, but rather a brief outline of the subject in a general manner, sufficient for the guidance of the medical practitioner. In these days very few practitioners will escape being faced with a possible case of poisoning. The section opens with a short summary of the law of poisoning, a brief outline of legislation relating to the sale and prescription of poisonous drugs. Three common poisons—

carbon monoxide, aspirin and barbiturate—are described in some detail. Then follows a summarised table of poisons likely to be encountered by practitioners, together with guidance with regard to material which should be collected from live or dead patients suffering from alleged poisoning.

Part III deals essentially with formal matters of legislation and contains a glossary of special terms.

For those having a special interest in a particular topic many references for additional reading are given in each section. The volume contains some eighty-six illustrations.

In general the book is a very readable volume, well printed and attractively produced in a flexible binding. A valuable asset to the library of any medical practitioner.

J. B. FIRTH.

An Introduction to Evidence. Second edition. By G. D. Nokes, LL.D., Barrister-at-Law, Professor of Law in the University of London. London: Sweet & Maxwell, Ltd. 1956. xxxvi and 468 and 12 pp. (37s. 6d. net.)

The first edition of this book was so obviously just what teachers and students of the subject required that the absence of any drastic changes in the second should occasion no surprise. The work has been brought up to date in admirable fashion and a number of passages have been rewritten. These undertakings ought not to be minimised as they have caused an increase of some fifty pages, but the merits and demerits of the book remain substantially as they were, the merits being in considerable preponderance.

It is permissible to enlarge upon these topics because no previous comment has appeared in this review. The book has two great merits—brevity and lucidity. Both are essential to a work which is intended to cater for all kinds of student, but they are very seldom combined. It is all too common for books of this nature to be either too concise to be readily comprehensible or too long to be easily digested by any but the most tenacious. That it is possible to avoid each of these pitfalls is made plain by the masterly chapters on the admissibility of extrinsic facts in relation to documents, the rule against hearsay and the exceptions to that rule. Even if such chapters as those on evidence of character and proof of documents appear to compress too much information into too short a space, the author finds time for a certain amount of dry humour and copious historical references.

No one has yet devised a perfect arrangement for a book on evidence, and the order in which the different branches of the subject are treated in the book under review is not above criticism. Though it is common to do so, it is not helpful to discuss the doctrine of *res gestae* many pages before the rule against hearsay is considered; privilege and public policy should be the subjects of separate chapters; while all that the author has to say about such matters as the burden of proof and the cross-examination of witness ought to be placed under one head. These dogmatic assertions merely reflect the reviewer's personal opinion, and cannot detract from the undoubted merits of this introduction to evidence. No beginner can do better than to read this book, and it is all that the unambitious student need read.

RUPERT CROSS.

Quarter Sessions. Index of Common Penalties and Formalities. By G. N. C. Swift and R. L. Graham, Clerk and Deputy Clerk of the Peace of Cumberland. Chichester: Justice of the Peace, Ltd. 1956. (10s. 6d. net.)

This book represents a practical and clearly compiled guide to the punitive powers of the court and should prove of great benefit to all those concerned in the trial of offences at quarter sessions.

The book itself, though very flat and comprising only sixteen pages, is large in area, but this has the great advantage of being readily discernible amongst papers in court, and I particularly liked the thumb index which should save much time when looking up details of a specific penalty.

It is especially recommended for the use of clerks whose duty it is to advise upon the law relating to various punishments, and also for justices who should find its clear and concise notes to be of the greatest assistance.

CYRIL E. S. HORSFORD.

The Rise of Scotland Yard. A History of the Metropolitan Police. By Douglas G. Browne. London: George G. Harrap & Co., Ltd. 1956. 379 and (bibliography and index) 12 pp. (25s. net.)

Critical Years at the Yard. The Career of Frederick Williamson of the Detective Department and the C.I.D. By Belton Cobb. London: Faber & Faber, 1956. 240 and (bibliography, police officers and index) 11 pp. (15s. net.)

Both these books deal with the history of the Metropolitan Police. Mr. Browne treats of the rise of the Metropolitan Police right from the earliest days up to the present time, with particular emphasis on the organisational side of the Yard itself. Mr. Cobb deals with the period from 1860 to 1889, when the Yard was suffering from growing pains and was under attack from time to time. Mr. Browne's is a more scholarly work than Mr. Cobb's, but both are very interesting and extremely well written, and will undoubtedly find ready acceptance among police officers and others directly concerned. The general reader will also find them enjoyable. Mr. Browne's book is notably good value for money.

M. W. M.

Memoirs of a Bow Street Runner. By Henry Goddard. London: Museum Press, Ltd. 1956. xxxi and 253 pp. (18s. net.)

Very little good has been written about the Bow Street Runners. They were disbanded in 1839 and their place has been taken by the Metropolitan Police. In its early days the upholders of the Metropolitan Police Force did much to destroy the reputation of the Runners and it is a pleasure to read a book which does something to redress the balance.

This book is the autobiography of a Bow Street Runner who subsequently became a Chief Constable. The collection of memoirs is introduced and admirably noted by Mr. Patrick Pringle who has taken trouble to verify Goddard's accounts of the crimes he investigated. Goddard was at times privately employed and was engaged to guard the valuables at the Eglington Tournament, to chase a runaway bankrupt to America and to watch the Duke of Brunswick.

The author writes with a clarity and economy which make the volume well worth reading. It can be recommended to all who are interested in criminal detection.

P. A.

Cell 2455 Death Row. By Caryl Chessman. London: Longmans, Green & Co. 1956. 311 pp. (16s. net.)

This book is the autobiography of Caryl Chessman, self-confessed gunman, robber and hoodlum. One-third of the story is told in the third person and for the remaining two-thirds of the book the reader knows that the central character, Whit, is the author himself. Each part has its own fascination, the first because it tells straightforwardly the story of a young criminal, how and why he rebelled against society, and the remainder because it poses the question: " What is to be done with people like me? " Perhaps the most remarkable thing about the book is that it was written while the author was under sentence of death in a Californian State prison and he was, at the same time, carrying on a forensic battle for his life in the United States courts. He was, he says, the first condemned man ever to defend himself at his trial and then handle all subsequent litigation himself. It ought also to be said that, although he admits to having taken part in offences of almost every conceivable kind, he denies strenuously that he ever committed the offences of kidnapping and robbery for which he was sentenced to death. However, the object of writing this book was quite clearly not to plead for mercy. In the author's own words the purpose is " not to justify or excuse what I have done; perhaps my actions cannot be justified or excused, but surely they can be understood and a large social significance derived from them." The book clearly demonstrates how one particular criminal acquired his criminal tendencies and his " hate against society," but it would perhaps be a mistake to regard this history, as Chessman apparently does, as having an application to most criminals. Imprisonment reacts on different people in different ways; this imprisonment has given Chessman a social conscience that he had lost or buried years before. But many of the criminals the author tells us about were not those driven, as he was, by a fanatical rebellion against society and all it stands for, but were " young men who thought that taking money from other people at the point of a gun was an easy way of making a living."

That this book contributes to society's knowledge of the criminal mind (or, at all events, a certain type of criminal mind) there can be no doubt. It is powerfully written and, whether as a contribution to criminology or simply as a story, it is well worth reading.

HENRY PALMER.

The Greer Case. By David W. Peck. London: Cassell & Co. Ltd. 1956. xi and 209 pp. (13s. 6d.)

An American society widow died in 1946 leaving half a million dollars to Harvard University. The will was contested by the State and by a man who claimed to be her illegitimate son, of whose existence she had often spoken.

The painstaking investigation carried out by the lawyers engaged in the dispute to unravel the confusion caused by the discrepancies in the dead woman's own accounts of her son's birth forms the basis of this " detective story without a crime."

The evidence they unearth is largely documentary, but its incompleteness and inconclusiveness leave the reader wondering, even after the judge has reached his decision, how much of the truth remained undiscovered.

This account of the case as presented to the court is marred by a style which, especially in the opening and closing chapters, has the effect of losing the inherent natural drama of the proceedings under a veneer of melodrama.

A. L. N.

Portrait in Grey. By Norman Howarth Hignett. London: Frederick Muller, Ltd. 1956. 233 and (appendices, addendum and index) 38 pp. (18s. net.)

In his foreword to Mr. Hignett's book Lord Pakenham writes that he believes " it represents the most systematic effort yet made to describe the working of our prison system from the prisoner's point of view," and this is a good description of the purpose and achievement of the book. In reading it one gains most from the straightforward description of prison life, and the effect of prison rules and regulations in practice. Although Mr. Hignett criticises the present prison system severely, sometimes unfairly, he is constructive in that he offers a number of proposals for reform, ranging from the reconstitution of the Prison Commission to the provision of a 60-watt bulb for the cell-light.

An interesting point is the manner in which the author refers many times to *Against the Law* by Peter Wildeblood for corroboration.

V. W.

Books Received :

Law of Food and Drugs. Second edition. By The Hon. Gerald Ponsonby, M.A., of the Middle Temple and Oxford Circuit, Barrister-at-Law. London: Charles Knight & Co., Ltd. 1956. xxxviii and 367 and (index) 24 pp. (55s. net.)

The Law in Action. A series of broadcast talks. Vol. 2. London: Stevens & Sons, Ltd. 1957. viii and 134 pp. (10s. net.)

Smugglers Ahoy! By Ben Herrington, O.B.E. London: Frederick Muller, Ltd. 1957. 192 pp. (15s. net.)

Much in Evidence. By Henry Cecil. London: Michael Joseph, Ltd. 1957. 192 pp. (12s. 6d. net.)

They Were Murdered in France. By Harry J. Greenwall. London: Jarrolds. 1957. 160 and (index) 4 pp. (16s. net.)

The Life of Richard Stafford Cripps. By Colin Cooke. London: Hodder & Stoughton. 1957. 406 and (index) 9 pp. (30s. net.)

The Delinquent Child and the Community. By Donald Ford. London: Constable. 1957. xii and 200 and (bibliography and index) 4 pp. (24s. net.)

Sexual Offences. A Report of the Cambridge Department of Criminal Science. London: Macmillan & Co., Ltd. 1957. xxvii and 514 and (appendices and tables) 37 pp. (63s. net.)

Reader's Digest:

Children and young persons: Juvenile courts—various aspects of their work: 7 *British Journal of Delinquency* 181, 196, 242.

Children and young persons: Juvenile penal law in Germany: 7 *British Journal of Delinquency* 206; in Switzerland: *ibid.*, 228.

Evidence: Evidence of persons jointly charged (founded on *Rigby* v. *Woodward* [1957] Crim.L.R. 184): 65 *Police Review* 133.

Evidence: Putting character in issue by imputations on the character of the prosecutor or the witnesses for the prosecution: 223 *Law Times* 71, 99.

Indictment: Preferring additional counts in indictment when accused has elected to go for trial: 21 *Journal of Criminal Law* 74.

Infanticide: Definition and suppression: *International Criminal Police Review*, January, 1957, p. 3.

Procedure: Appeals from magistrates' courts: 223 *Law Times* 86.

Public mischief: Effecting a public mischief: 21 *Journal of Criminal Law* 60.

Road traffic: Defences under the Road Traffic Act, 1956: 101 *Solicitors' Journal* 161.

Road traffic: Endorsing a licence: 13 *The Magistrate* 24.

Road traffic: Warning of intended prosecution; the effect of section 30 of the Road Traffic Act, 1956: 121 *Justice of the Peace* 112.

THE
CRIMINAL LAW
REVIEW

Editors
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Editorial

Preliminary hearings in magistrates' courts

Examining justices are not obliged to sit in open court (Magistrates' Courts Act, 1952, s. 4 (2)), but the power to hear proceedings preliminary to trial on indictment in private is rarely exercised. Some advocate that it should be exercised more often or that newspapers should be prevented from publishing reports of the preliminary hearing which may tend to prejudice public opinion against the accused. Devlin J. considered the point in his summing-up in the trial of John Bodkin Adams at the Old Bailey and made the following remarks with the full approval of the Lord Chief Justice[1]: "I think it would have been wiser in this case if these preliminary proceedings before the magistrates had been held in private; because when you have a case which arouses widespread discussion it is inevitable reports should appear in the Press, and as I reminded you in the beginning of this case, the proceedings before the preliminary magistrates were quite different from the proceedings as they emerged in this Court. They would be read by the public consequently and by members of the public who might be asked to serve on the jury. I hope it will not be thought that I am making any serious criticism of the decision of the magistrates in the sense that I do not feel myself it was the right one, because they had a difficult decision to take and they were following what has become an almost universal practice of holding these proceedings in public. Nor am I making any criticism of the general rule that except for a good and special reason it is best that all stages of the criminal processes should be conducted in open court, as part of our tradition. But there are two points that must always be remembered. The first is that Parliament itself gave a discretion to magistrates, and when Parliament gives it, it intends it to be used unless there may be exceptional cases. The second is that these preliminary proceedings were first laid down in the Act of 1848 for the benefit of the accused. It would be, I think, a very unfortunate thing if proceedings which were designed for the benefit of the accused could indirectly result or may turn out to be prejudicial to his interests." In every case where application was made for the exclusion of the public the magistrates could not do better for guidance than go to the words of the Act of 1848 which dealt with the matter.[2]

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[1] See *The Times*, April 9, 1957.

A departmental committee, under the chairmanship of Lord Tucker, is to be appointed with the following terms of reference: To consider and report whether it is necessary or desirable that any restrictions should be placed on the publication of reports of proceedings before examining justices.

Prisons

Although Mr. Butler has only been Home Secretary for a short while he showed during the debate on the civil estimates that he has already a firm grasp of the main problems of the prison system and a constructive attitude towards their solution.[3] In all the matters he touched upon—the size of the prison population, the building programme, staffing problems and prisoners' work and earnings—there are either experiments being tried or changes being considered. The Home Secretary recognises the need to gather more information on all matters concerning prisons and intends to give priority to research.

In administering prisons the Home Office has no control over one important factor, namely, the sentencing policy of the courts. The Home Secretary suggested that there may be ways in which the Government and the judiciary could collaborate over this matter, but it is necessary to avoid infringing constitutional safeguards.

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[2] Section 4 (2) of the Magistrates' Courts Act, 1952, provides: " Examining justices shall not be obliged to sit in open court." It replaces section 19 of the Indictable Offences Act, 1848, which provided: " The room or building in which . . . justices shall take such examinations . . . shall not be deemed an open court for that purpose; and it shall be lawful for such . . . justices, in . . . their discretion, to order that no person shall have access to or be or remain in such room or building without the consent or permission of such . . . justices, if it appear to . . . them that the ends of justice will be best answered by so doing."

[3] H.C. Debates, Vol. 566, cols. 1142 *et seq.*; March 13, 1957.

One practical way of preventing conflict between the two is to furnish the courts with the fullest possible information available about the various methods of treatment of prisoners and their effects.

Cells at the Old Bailey

Counsel recently complained at the Old Bailey that his clients, two young women, while awaiting trial had " been incarcerated in deep, damp, dark dungeons which can only be described as barbaric relics of the torture chambers of the Middle Ages." Later, facilities were granted by the Clerk of the Court for members of the press to see the cells in which prisoners await their trial. Male prisoners are placed in cells on the ground floor and women in cells in the basement. The cells are all ten feet by four feet and about ten feet high. The concrete floors are uncovered and the furniture consists of a wooden stool and low table. When the press representatives visited them, the cells were warm and spotlessly clean; some of the ceilings needed re-distempering and some of the walls needed fresh whitewash.[4]

Goods vehicles

The Vehicles (Excise) Act, 1949, imposes a duty on goods vehicles the rates of which depends, among other factors, upon the unladen weight of the vehicle. The unladen weight is the weight of the vehicle exclusive of " loose equipment." In *Blaikie* v. *Morrison*, 1957 S.L.T.(Notes) 17 the High Court of Justiciary considered what constitutes " loose equipment." In *Lowe* v. *Stone* [1948] 2 All E.R. 1076 the test applied was whether the equipment in question altered the capacity of the vehicle, enabling it to carry a bigger load. Lord Thomson doubted whether this was an exhaustive or a satisfactory test; things like ropes or tarpaulins might increase the load-carrying capacity of a lorry and yet would probably be classed as loose equipment. He suggested that the test is " the more practical one of the nature of the superstructure, the use to which it can be put and the manner and character of its attachment to the lorry. It becomes a question of the degree of attachment and the function of the superstructure, and being a question of degree it is very much a question of fact . . ."

New commandant for police college

Major-General R. W. Jelf has been appointed commandant of the Police College at Ryton on Dunsmore and Breamshill, Warwickshire, in succession to the late Brigadier P. D. W. Dunn. The Secretary of State for War has released Major-General Jelf from his appointment as Chief of Staff, Eastern Command, for this purpose.

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[4] See *The Times*, March 21, 1957.

Probation

It is now fifty years since the passing of the Probation of Offenders Act, 1907, and the introduction of probation in our courts. The annual conference of the National Association of Probation Officers, which is to be held in London from May 3 to May 5, therefore assumes a special interest. We hope to publish a report of it in our next issue.

Parliament

Police

The strength of the Metropolitan Special Constabulary has steadily declined in recent years and the Commissioner of Police has appointed a committee with the following terms of reference: To examine the organisation, administration, training and employment in peace and war of the Metropolitan Special Constabulary and to make recommendations affecting improvements and economy in the light of experience and present-day conditions (H.C. Debates, Vol. 567, col. *61* ; March 21).

Identification parades

A suggestion that a photograph of the parade should be taken whenever an identity parade is held to allow juries to judge whether persons selected at random were a fair sample has been rejected by the Home Office. If a suspect feels that a parade is unrepresentative or unfair, he can object and his attention is drawn to that right (Vol. 566, col. 516 ; March 7).

Offensive weapons

There has been an encouraging response to the appeal to traders to confine the sale of spring-clip knives to customers known to have a legitimate use for them. Such knives are used extensively by farmers, fishermen, butchers and electricians. The Home Secretary does not consider that any further action on his part is necessary, but he will continue to watch the situation (Vol. 566, col. 508 ; March 7).

Prisons

On March 4 the total staff, men and women, of prisons was 3,795 against an approved establishment of 3,977. These figures do not include the staffs of borstals and detention centres nor auxiliary officers under training (Vol. 566, col. 526; March 7). The proportion of prisoners to governors and assistant governors is 219 to 1 in men's local prisons and 78 to 1 in women's local prisons (Vol. 566, col. 528 ; March 7). Forty-nine medical practitioners are employed full-time in prisons in England and Wales and of these six hold the Diploma of Psychological Medicine (Vol. 566, col. 530 ; March 7).

Prison standing orders prescribe an elaborate procedure for recording and verifying sentences to be served by prisoners. This procedure is to be reviewed to see whether further practicable safeguards against error should be introduced (Vol. 566, col. 531 ; March 7).

Preventive detention

The Home Secretary has no authority to prevent the publication in court of the whole or part of preventive detention reports by the Prison Commissioners (Vol. 566, col. 524 ; March 7).

Hunting

The Government are not prepared to introduce legislation making the hunting of deer with hounds illegal (Vol. 566, col. 518 ; March 7).

Judicial appointments

Mr. J. F. Drabble, Q.C., has been appointed Recorder of the City of Kingston-upon-Hull, Mr. Norman Harper, Recorder of the City of Bradford, Mr. G. R. Swanwick, M.B.E., Recorder of the City of Lincoln, the Hon J. R. Hovell-Thurlow-Cumming-Bruce, Recorder of the Borough of Doncaster, Mr. R. Withers Payne, Recorder of the Borough of Huddersfield and Mr. W. A. B. Joss, Recorder of the Borough of Pontefract.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

The Homicide Act, 1957

By D. W. Elliott, LL.B.
Lecturer in Law in the University of Manchester

It has been said that the English genius is for compromise, but it is also a truism that he who seeks to please everyone ends by pleasing no one. The events leading up to the introduction of the Homicide Bill are too complicated and too well known to recount here, but it may be said that it is the contention of the Government that the perennial controversy between the abolitionists and the retentionists of capital punishment will be stayed or at any rate damped down by a measure partially acceptable to both. This seems an unduly optimistic forecast when it is remembered, on the one hand, that the number of executions for murder is admitted to be not likely to decline from that obtaining in the last few years (a fact which cannot be viewed with satisfaction by the abolitionists), and on the other hand, that the complexities introduced into the law may well result in the most deliberate and cruel murderers escaping a charge of capital murder (which will hardly please the retentionists). Indeed, it is suggested that the Act will please no one except perhaps the framers of examination questions, and would-be murderers, to whom a close study of Part II of the Act is to be highly recommended.

The Act follows in point of time the extremely full and closely reasoned Report of the Royal Commission on Capital Punishment,[1] but although it carries out the recommendations of the Commission in some respects, it does not do so in other more important matters, such as the question of degrees of murder.[2] Part I reforms in certain particulars the English law of murder. Part II, which applies also to Scotland, abolishes the death penalty for most forms of murder. Part III, which does not apply to Scotland except as to section 11, makes amendments as to the form and execution of the death sentence. No part of the Act applies to Northern Ireland, except as regards courts-martial.

Part I. Amendments to the Law of Murder

Abolition of " constructive malice "

Section 1 abolishes " constructive malice," both the form exemplified by *Beard's* case [1920] A.C. 479 (intent to commit a felony of violence), and that set out in *R.* v. *Porter* (1873) 12 Cox 444 (intent to resist an officer of justice or to avoid lawful arrest). In this the Act follows the recommendation of the Royal Commission.[3] However, apart from this, it makes no change in the law of malice aforethought, express or implied. The Act does not say that causing death in the course of some other offence shall be murder only if there is an intent to cause death; it says that such is murder if done with the same malice aforethought, express or implied, as would make it murder if there were no other offence involved. In other words it is sufficient if, in the absence of provocation, the prisoner foresaw or intended or is taken to have foreseen or intended death or grievous bodily harm, whether to the person killed or to any other person. This is subject to the provisions of section 4 as to suicide pacts.

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[1] Cmd. 8932.

[2] § 534.

Diminished responsibility

Section 2 introduces the doctrine of diminished responsibility into the law of murder. It provides:

> (i) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing. . . .
>
> (iii) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

On this it may be said that the introduction of the doctrine was not recommended by the Royal Commission unless it could be applied to responsibility for all crimes, and then only after consideration by some specially appointed body.[4] And indeed, it is difficult to see why abnormality of mind should reduce a man's responsibility for murder, but not for other crimes, especially now that most murders are not capital offences even if committed by someone with full responsibility. It will be remembered that the defence of insanity, as regulated by the McNaghten Rules, always applied to all crimes, although of course it was usually pleaded only in murder cases.

The mental abnormality contemplated by section 2 appears to cover the kinds of insanity embraced by the McNaghten Rules, and to extend to lesser degrees of affliction not covered by those

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[3] § 111.

[4] § 413.

Rules. Let it be granted that there is widespread dissatisfaction with the limitations of those Rules, and that it is thought by many to be undesirable that persons whose mental abnormality does not come within the Rules should be exposed to the full rigour of the criminal law; it may nevertheless be questioned whether this section goes the right way about keeping the law abreast of medical science. Apart from the criticism made above, that it applies only to murder, there is the fact that it applies to people who *are* within the McNaghten Rules. It cannot be doubted that such persons are suffering from such abnormality of the mind as substantially to impair their mental responsibility. The Act does not abolish the defence of insanity, but it is difficult to see why any prisoner should ever plead it and risk lifelong detention as a Broadmoor patient. Indeed the Attorney-General admitted in the Commons that this section will virtually end the relevance of the McNaghten Rules, so that all prisoners, affected by any substantial degree of mental abnormality, will be entitled to be treated alike. And how they are to be treated gives rise to further misgivings. They are not to be detained during Her Majesty's pleasure; they are to be convicted of manslaughter and so treated like mentally normal prisoners, entitled to release at the expiration of whatever term of imprisonment the judges see fit to award them. Of course a prisoner who is or becomes certifiable during his imprisonment is not likely to be released, but can anyone defend an allegedly reforming provision which will result in psychopaths and other abnormal prisoners being sent to ordinary prisons and mixing with the "ordinary" prisoners there? It may be that judges will make a practice of sentencing persons acquitted of murder under section 2 to imprisonment for life, so that the date of their release will depend on the view taken by a Secretary of State of the circumstances of an individual's case, including his mental state, but the fact remains that there is no machinery established by the Act to ensure that such persons are treated rather than punished. Since abnormal prisoners were not usually executed under the law in force hitherto, one would have thought that the establishment of such a procedure would be the main object of any reformer.

Before we leave this section, it is to be noted that the burden of proving excusing mental abnormality is on the defence, and that the abnormality of one party to a crime is not to affect the liability of other, normal, parties.

Provocation

Section 3 deals with provocation:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

It will be recalled that the House of Lords in *Holmes* v. *D. P. P.* [1946] A.C. 588 laid down in effect that mere words could never or almost never be sufficient provocation to reduce murder to manslaughter. The draftsman appears to seek to reverse this rule and to allow provocation " by things done or by things said or by both together." In this he follows the recommendation of the Royal Commission.[5]

The section also adopts the Commission's recommendation[6] by confirming the existing law laid down in *R.* v. *Lesbini* [1914] 3 K.B. 1116 and *Mancini* v. *D. P. P.* [1942] A.C. 1 that the test to be adopted by the jury in deciding whether the provocation was sufficient to cause loss of self-control is the objective one of the reasonable man; they must consider " whether the provocation was enough to make a reasonable man do as (the prisoner) did." To make the test solely whether the *prisoner* was so provoked as to lose his self-control, as the Commission was urged to recommend, would be to penalise unduly the even-tempered man. As Lord Cooper said in evidence, " there might be circumstances in which a bad-tempered man would be acquitted and a good-tempered man would be hanged, which, of course, is neither law nor sense."[7] However, it must be said that even as the law has been, the even-tempered man was placed at a disadvantage as against the bad-tempered, since not only must the provocation be such as to cause the reasonable man to lose his self-control, but it must actually have caused *the prisoner* to lose his self-control.

The wording of this section leaves much to be desired. Taken as a whole, the section seems to be transferring from the judge (where it now is) to the jury the responsibility of deciding whether the facts are capable of amounting to sufficient provocation— " the question whether the provocation was enough to make a reasonable man do as (the prisoner) did shall be left to be determined by the jury." However, the section opens with the words,

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[5] § 151.

[6] § 143.

[7] § 142.

"Where . . . there is evidence on which the jury can find. . . ." Whether there is evidence to go to the jury has always been regarded as a question of law for the judge. On analysis it will be seen that a judge's deliberations on the sufficiency of evidence are of two kinds:

1. Are the allegations made by the party and supported by evidence *capable* of producing the legal consequences for which he contends? If so, the jury must decide whether the allegations are borne out by the evidence adduced. The judge decides this question in, *e.g.*, a defamation action where the plaintiff alleges that the words he says were used by the defendant bear a defamatory meaning.

2. Is there any evidence at all which tends to support the party's allegations, assuming that such allegations are capable of producing the legal consequences for which he contends? If so, the jury must decide whether such evidence is sufficiently convincing.

Hitherto, where provocation has been raised as a defence to a charge of murder, the judge has had to decide both these questions. Are the facts alleged to have happened sufficient to constitute provocation? If so, is there any evidence that those facts happened?

If, as seems likely, it is the intention of the legislature that the jury will have the deciding of whether there is provocation, it is necessary to restrict the words "where . . . there is evidence on which the jury can find" provocation to mean "where there is a sufficiency of evidence to support the prisoner's allegations." This will confine the judge's function to deciding whether any reasonably cogent evidence is offered by the defence; he will not decide whether the facts alleged can constitute provocation.

But the difficulty in the way of this restrictive interpretation lies in the fact that one would expect the word "evidence" to mean *legally* relevant evidence, *i.e.*, that which is relevant to allegations which have the legal force contended for them by the party making them. For example, where a judge rules that there is evidence of fraud, he is ruling that there is a minimum sufficiency of evidence to show a state of mind which the law calls fraudulent. If the evidence, although of such a quality and quantity as to be eminently credible, merely goes to show negligence, the judge will rule that there is no evidence of fraud, whatever view that evidence may cause the jury to take of the defendant's character.

So, in a murder case, the judge would be justified in saying: "The prisoner has adduced ample evidence of what he calls provocation; but it is not what I call provocation, so I rule that there is no evidence of provocation." It is submitted that the position still obtains that a judge can say that what the prisoner contends is provocation is not, so that section 3 does not apply, since there is no evidence on which a jury can find that he was provoked in any way relevant to the charge. If this is so, it would appear to be open to the judge to rule that mere *words* are not provocation, in spite of what the section says about " by things done or by things said or by both together."

The great defect of the section is that it does not say what effect provocation has on a charge of murder, nor does it say what can amount to legally relevant provocation. It leaves these things to be dealt with by the existing law, and merely says that in performing *their* function, the jury shall have regard to the effect of everything done or said on a reasonable man. What is wanted is some categoric laying down that the law is changed and that henceforth mere words can be such provocation as to reduce a charge of murder to manslaughter, provided that in the opinion of the jury a reasonable man in the prisoner's place would have lost his self-control. Instead of which the judge is left in control of the question of whether the acts or words alleged can in law amount to provocation, and he is nowhere enjoined to rule that words can amount to provocation.

Suicide

Section 4 provides that the survivor of a suicide pact is to be guilty of manslaughter and not murder, whether he actually kills the other person or is merely a party to that other person's death. However, the prisoner must prove that he acted in pursuance of a suicide pact, and that he had a settled intention of dying himself. This rules out those so-called " mercy " killings, where one man kills another at the latter's request.

Part II. Liability to Death Penalty

Section 7 provides that no one shall suffer death for murder in any case not falling within section 5 or 6. The sentence instead shall be one of life imprisonment (s. 9 (1)). Section 5 provides that certain murders shall be capital murders, and section 6 retains the death penalty for repeated murders.

The Royal Commission considered at great length the practicability of establishing degrees of murder, with the death penalty confined to the more heinous. The conclusion it reached was that the theoretical and practical objections were such " that the object of our quest is chimerical and that it must be abandoned."

Nothing daunted, the legislature, in section 5, sets up certain classes of murder which are to be punished more heavily than other classes. This, according to the Attorney-General, is because they are the more serious in the light of the public interest [8] or, according to the Home Secretary, because they conflict most with law and order,[9] two tests which are not obviously more objective than the test of heinousness or atrocity rejected by the Commission as being too subjective.[9a]

Murder in course or furtherance of theft

The first class of capital murder is defined as one *done in the course or furtherance of theft.* "Theft" includes any offence which involves stealing or is done with intent to steal. On the policy behind this provision one need say no more than that it does not appear to be dictated by either the Attorney-General's test of seriousness in the light of public interest or the Home Secretary's test of conflict with law and order. Of course, it may discourage burglars and footpads from silencing their victims for ever, but ought not persons committing rape or arson, for example, to be similarly discouraged?

The requirement of an intent to steal threatens to present a court with thorny problems of fact and law which should be irrelevant in a murder trial but which will be regarded as vital by both Crown and defence and will be fought out at enormous length. The law of murder is surely intricate enough without dragging in the complexities of the law of larceny. It is true that in most cases where the prisoner has thought fit to use violence towards his victim, one is not faced by problems of claims of right, or deceit producing larceny by a trick or obtaining by false pretences, nor is it doubtful whether the prisoner meant permanently to deprive the owner of his property. Even so, it is not difficult to imagine cases where the vital question arises whether the ulterior offence was larceny or some other crime. Suppose A *attempts* to deprive B of property by lying, and, on B seeing through the lie, kills him to avoid a charge. Here on a trial for murder the jury must solve the question whether A meant B to give him ownership or merely possession. Or let A, a servant, kill his master, B, when the latter surprises him falsifying his accounts. Here if A's ultimate object was to hand over less than he had collected from his master's customers, the murder is in furtherance of an attempted embezzlement, but if the plan was to return less than he should of money given him by B to meet disbursements, his intent is to steal. B deposits money with A and A kills B to avoid returning it. If the money was in a bag which was to be returned intact, A's intent is to commit larceny as a bailee; if the money is loose, the most that A's ulterior crime could be is fraudulent conversion. ?

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[8] H.C. Debates, Vol. 560, cols. 1256 *et seq.*; November 15, 1956.
[9] *Ibid.*, Vol. 561, cols. 1132 *et seq.*; December 4, 1956.
[9a] §§ 485 *et seq.*

Even if in any particular case it is obvious what the ulterior crime is, it is capricious to say the least to make A's life or death hang on such essentially irrelevant matters. A murders his wife to get possession of a trinket which he covets. If the wife's will leaves the trinket to A, or if A is her executor, he cannot hang, since his object is merely to accelerate his inheritance, but he is guilty of capital murder if the trinket is left to a third person, and A is not her executor. Or as it was put by Lord Simonds in the House of Lords in the 1948 debate [10]—" A murderer who commits his murderous act to the accompaniment of section 23 of the Larceny Act is to go to his doom, but one who does it to the accompaniment of section 24 is not." [11]

Finally the murder is only capital if done in the course or furtherance of theft. Once the theft is complete, *i.e.*, once there is asportation, it is not capital murder to dispose of the victim, unless he is trying to apprehend the thief, when the case comes under one of the later heads of capital murder.

Murder by shooting or explosion

The next capital murder is one done by *shooting or by causing an explosion*. The policy behind this is, according to the Home Secretary, first to teach the professional criminal not to carry weapons, and second, to discourage indiscriminate murders.[12] But first, it does not discourage the carrying and using of knives, razors, coshes, hatchets and the like, and second, poisoning, which can be as indiscriminate as any other method, is not on the list of capital murders. Moreover to punish indiscriminate murders more severely than others seems to involve the adoption of the principle that it is more reprehensible to kill " innocent " third parties than to kill those who are intended to be killed, who are presumably not so innocent and not as entitled to the law's protection. Although it is probable that the provision will not prove unduly difficult to interpret or put in operation, on the *rationale* behind it one can only echo the opinion of Mr. Stewart in Committee that what the law regards as anathema are *noisy* murders, so that a judge might address a prisoner convicted under this head somewhat as follows: "You are not only a murderer but a noisy murderer. You upset people. You not only commit one of the wickedest offences a human being can commit, but you must needs go and make a noise about it and very probably the Home Secretary will have to answer questions about you in the House of Commons. If you show disregard of public decency to the extent that you not only murder people but do it in a noisy fashion, you must expect to be put to death." [13]

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[10] H.L. Debates, Vol. 157, col. 1042; July 20, 1948.

[11] Then there are cases of what might be called " accidental larceny." A kills someone in the course of " borrowing " a vehicle. No larceny is involved unless the vehicle is a motor-vehicle, when there is larceny of the petrol. Sections 23 and 24 relate to robbery and sacrilege respectively.

[12] H.C. Debates, Vol. 561, cols. 1173 *et seq.*; December 4, 1956.

Other capital murders

The remaining three heads of capital murder are

- (c) any murder done in the course or for the purpose of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody;
- (d) any murder of a police officer acting in the execution of his duty or of a person assisting a police officer so acting;
- (e) in the case of a person who was a prisoner at the time when he did or was a party to the murder, any murder of a prison officer acting in the execution of his duty or of a person assisting a prison officer so acting.

These, it is suggested, are obviously necessary for the protection of police and others carrying out the duties cast upon them by law, and require little comment except to say that, as a result of section 1, unless there is express or implied malice aforethought in the killer, the killing is not only not capital murder, but is not murder at all.

Subsection (2) of section 5 provides that where two or more persons are concerned in a capital murder, only the principal in the first degree is to be guilty of capital murder, the accomplices being guilty of non-capital murder.[13a] Although this goes against the Report of the Royal Commission, the Government resisted any amendment designed to get rid of the subsection because, according to the Attorney-General, to do otherwise would be to retain a fragment of the doctrine of constructive malice.[14] This, with respect, is difficult to follow, since that doctrine had nothing to do with complicity but merely affected the nature of the crime committed by the principal in the first degree. The accomplices shared his guilt on general principles of criminal liability, valid for all felonies. However, the position now seems to be that if you plan to commit a capital murder, your best course is to hire someone to do it for you, preferably a gang with one member under the age of eighteen.[15] Let the adults confine themselves to giving assistance and let the youth fire the fatal shot, and the satisfactory position is reached that no one is liable to be hanged.

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[13] *Ibid.* col. 1168.

[13a] As to the indictment see S.I. 1957, No. 669.

[14] H.C. Debates, Vol. 560, col. 1253; November 15, 1956.

Repeated murders

Section 6 retains the death penalty for repeated murders, *i.e.*, for those who are convicted of two murders done on different occasions. There is no necessity for the second murder to be committed after the *conviction* for the first (in fact they can be included in one indictment and tried together, unless the interests of justice demand otherwise) nor need the first conviction be after the commencement of the Act. But both of the murders must be done in Great Britain, and the second must be done on a different occasion from the first.

Given the premiss that the death penalty must be confined to certain cases where the requirements of public safety are imperative, few would deny the need for this section if it dealt only with the man who *after a conviction* for murder goes out and murders again, nor would any practical difficulties suggest themselves. But the section deals with any person who commits two murders, provided they are done on different occasions. It provides no deterrent for the man who kills a second victim on the same occasion as the first, so it is a poor lookout for eyewitnesses to murders. One would have thought that all double murderers should be treated alike (except, perhaps, those previously convicted of murder, for whom a case for special treatment can be made out), but under this section if a man has " on his little list " both his wife and his mother-in-law, he is well advised to kill two birds with one stone. Let him confine the slaughter to one occasion, and he escapes the risk of hanging, under this section at least.

A practical difficulty may well be that of deciding when murders are done on different occasions. What is *an occasion* can be an interesting philosophical question. If A stabs B and then immediately afterwards stabs C, strictly there are two occasions, but one supposes that the murders would in practice be considered as happening on one and the same occasion. If A, engaged in a prolonged transaction, kills two persons on different days, one might say that strictly it is all one occasion, but it may well be held that the interval between the killings makes two occasions. And again, when is a murder " done "? Is it when the events are set in train, or when the death is produced? If the former, it is murder done on different occasions if on Monday A prepares poison for B, on Tuesday prepares poison for C, and on Wednesday B and C at a common meal eat and die; but not if A prepares poison for both on Monday, and on Tuesday B eats and dies, followed on Wednesday by C. If the production of death is the vital factor, then the position is precisely the reverse.

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[15] See section 53 of Children and Young Persons Act, 1933, as amended by section 9 (3) of Homicide Act, 1957.

Courts-martial

Section 8 provides that a person convicted before a court-martial of murder (or of an offence corresponding thereto under the Acts relating to the Army or Royal Air Force) shall not be liable to the death penalty unless he is charged with and convicted of committing the offence under circumstances which, if he had committed it in England, would make him guilty of capital murder.

Part III. Amendments to the Form and Execution of the Death Sentence

Section 10 substitutes a new and simplified form of sentence of death for the one hitherto used in England, and section 11 (which extends to Scotland) abolishes the present requirement that notice of the execution shall be posted outside the prison where it takes place. The Secretary of State is now required to give notice in such manner as he thinks fit of the impending execution and, after the event, the fact that it has taken place. He is also required to publish in the *London Gazette* or the *Edinburgh Gazette* a copy of the coroner's inquisition or the sheriff's report respectively. This in part follows the recommendation of the Royal Commission [16] and should do away with the undesirable demonstrations which have been wont to occur outside the prison gates on the morning of the execution.

Finally, section 12 deals with " double " executions. Previously where two or more persons were sentenced to death for the same murder they were executed together. Following the recommendation of the Royal Commission,[17] the section allows the Secretary of State to direct that any of the convicted persons in such a case be removed to and executed in other prisons.

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[16] § 789.
[17] § 776.

Constructive Manslaughter

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-Law*

The English habit of leaving the development of the law to the judges means that it is capable of slow change over the centuries, without the intervention of Parliament. But it also means that at any given moment we may find difficulty in saying precisely what the law is. This is well illustrated by the law of constructive manslaughter.

Constructive manslaughter is that kind of involuntary manslaughter which can be committed without gross negligence, the accused having been engaged on illegality at the time when he accidentally killed. The very word "constructive" may be said to be a condemnation. A crime is said to be constructive when it does not fall within the ordinary meaning of terms, but is only brought thereunder by a strained interpretation or extension. It is in this sense that we speak of constructive treason, and of constructive murderous malice. For some centuries past, the trend of development in the law of homicide has been away from constructive crime; and a new manifestation of this trend is seen in the Homicide Act, 1957, section 1, which abolishes the felony-murder rule and the similar rule that it is murder to kill accidentally in the course of resisting an arrest.[1] The marginal note to the section implies that it abolishes all forms of constructive murder, but this is not the case, because the section does not touch the rule that an intent to do serious bodily harm short of death is murderous malice. It does not even affect the controversial decision in *Ward* [1956] Crim.L.R. 203, which seems to say that mere negligence as to serious harm is sufficient malice aforethought for murder.

Whatever effect the Act may ultimately have upon the older law of murder, plainly it does not directly alter the law of constructive manslaughter. It is, therefore, worth looking again at this part of the law to see how far it accords with present ideas.

The origin of constructive manslaughter

According to Coke the rule in his day was that a killing in the course of any unlawful act was murder. Later opinion confined this to killings in the course of violent felonies. The new view did not mean that other killings were excusable, for a killing in the course of a non-violent felony, or in the course of a misdemeanour or civil trespass, was still of the degree of manslaughter. This was some amelioration of the previous law, but it still left it quite severe. Both Foster and Blackstone stated that a mere civil trespass was a sufficiently unlawful act to attract the doctrine, except that the former confined it to acts that were wrong in themselves (*mala in se*, as opposed to *mala prohibita*). Not much has been heard of this qualification in later English law, because it is generally agreed that the distinction between *mala in se* and *mala prohibita* is of doubtful philosophic validity. It is still met with, however, in some of the American decisions.

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[1] See the article by Mr. D. W. Elliott, at p. 282.

Criticism of the doctrine

The doctrine of constructive homicide came under heavy fire from the codification commissioners of the nineteenth century. Macaulay and the other Indian Law Commissioners exposed at some length the injustice of the felony-murder rule as it then existed, or was thought to exist. Their criticism of this rule may stand as a model for any reformer who wishes to argue for expunging the doctrine of constructive homicide from the law. One would like to set out their eloquent language in full, but four sentences must suffice. "To punish, as a murderer, every man who, while committing a heinous offence, causes death by pure misadventure, is a course which evidently adds nothing to the security of human life. . . . The only good effect which such punishment can produce will be to deter people from committing any of those offences which turn into murders what are in themselves mere accidents. It is in fact an addition to the punishment of those offences, and it is an addition made in the very worst way. . . . Surely the worst mode of increasing the punishment of an offence is to provide that, besides the ordinary punishment, every offender shall run an exceedingly small risk of being hanged." These words were quoted with approval by the English Criminal Law Commissioners of 1845. The Commissioners of 1833 had applied the same philosophy to manslaughter. Criticising a passage in Foster, to the effect that an accidental killing in the course of conduct of which the judge disapproved for certain reasons was manslaughter, the Commissioners observed: "These are good reasons for prohibiting such a practice, by a direct and substantive law for that purpose; but it cannot be proper to check it indirectly, by making a mere accidental killing amount to manslaughter. Such a course would be, in effect, to make an objectionable practice a crime by indirect means, but as prevention is the proper object of inflicting punishment, such punishment ought, we think, to be directly annexed to the offence to be prevented." (Fourth Report (1839), Parliamentary Papers xix, 268–269.) The matter was again discussed by the later Criminal Code Commissioners in 1878 and 1879, and their proposal would have limited the rule to unlawful acts likely to cause death, where the accused was reckless whether death ensued or not.

Decisions applying the law of constructive manslaughter

These criticisms of the law had little effect upon judicial rulings, at least where a battery was involved. During the nineteenth century, if the accused had committed a battery upon another, no matter that it was not a serious one, and the other died in consequence, no matter how unexpectedly, this was uniformly held to be manslaughter at least. The rule was continued into the present century. Thus in *Alabaster* (1912) 47 L.J. Newsp. 397, D in a fit of jealousy when his mistress threatened to leave him caught her by the throat in order to detain her, but not intending to kill her. The woman died after the struggle, and D was charged with murder. He offered medical evidence to show that she had not died from suffocation, but was suffering from status lymphaticus, which made her liable to heart failure on the slightest shock. This evidence saved him from conviction on the major charge, but Bankes J. accepted a plea of guilty to manslaughter. In a similar case in 1908, the death was not even brought about by a battery, but only by an assault not amounting to a battery. D chased his wife P from the house into the road, uttering threats against her; she fell down dead. The post-mortem showed that P was suffering from a persistent thymus gland lying at the base of the heart. Such a state of affairs was quite abnormal at her age—22. The cause of death was cardiac inhibition, brought about by the fear and exertion in combination with her delicate condition. On these facts, Ridley J. ruled that "death from fright alone, caused by an illegal act, such as threats of violence, would be sufficient" to make it manslaughter. D was convicted of this crime (*Hayward* (1908) 21 Cox 692).

In both these cases and in *Towers* (1874) 12 Cox 530 the assault or battery was of a somewhat serious character, but the rule stated by the judges was wide enough to cover any assault or battery. The logical outcome of this attitude was shown by a Missouri case, where the victim of a blow on the jaw was a haemophiliac or "bleeder," and the blow caused a slight laceration on the inside of the mouth which in turn caused a haemorrhage and death. The striker was held guilty of manslaughter (*State* v. *Frazier* (1936) 339 Mo. 966, 98 S.W.(2d) 707). Yet he was not guilty of fault in respect of the consequence that he could not have foreseen. It may be said that in criminal law, whatever may be the case in the law of tort, a wholly unforeseeable consequence should not increase responsibility. This opinion, if adopted, would not mean that the defendant in cases like those just instanced would be beyond the reach of the criminal law, for he can always be convicted of the assault or battery. To charge him with the assault or battery alone means that the case is freed from the emotionally confusing and logically irrelevant fact of death.

But we must continue the recital of the cases. The doctrine of constructive manslaughter was applied even though the defendant had intended only to frighten, or to perpetrate some stupid joke. Among such acts resulting in death that were ruled to be manslaughter were: administering excessive quantities of intoxicating liquor to a young child in a sort of brutal fun (*Martin* (1827) 3 C. & P. 211); causing a cart to be upset as a joke, with no intent to harm any one (*Sullivan* (1836) 7 C. & P. 641); and building a fire round a drunken man in order to frighten him (*Errington* (1838) 2 Lewin 217). In the first and third of these cases (though not the second) there might be said to be sufficient negligence to justify a conviction for manslaughter; but the cases were not decided on the ground of negligence, but of constructive manslaughter in the course of an unlawful act.

The rule was also applied to omissions. In prosecutions of "Peculiar People," the jury were charged that where a parent committed a summary offence of neglecting his child by omitting to provide medical aid, even though in obedience to his religious belief, and the child died as a result, the parent was automatically guilty of manslaughter. See *Downes* (1875) 1 Q.B.D. 25 (C.C.R.); *Cook* (1898) 62 J.P. 712; *Senior* [1899] 1 Q.B. 283 (C.C.R.) No inquiry was made whether his negligence was sufficiently gross to be deserving of punishment.

It may be said that in some ways the least defensible extension of the doctrine in modern times was in connection with abortion. There is no doubt that as a matter of legal history the sole object of the abortion laws was to protect the unborn child. They were not in any way intended to protect the mother from a dangerous operation. Yet if the mother died as a result of the operation, although quite accidentally, the illegality vis-à-vis the unborn child was held to make the surgeon guilty of manslaughter of the mother. It was, indeed, only by the mercy of the judges that he was saved from being convicted of murder. See Archbold, 33rd ed., § 1654.

Restrictions upon the doctrine in the nineteenth century.

The most important restriction upon the doctrine of constructive manslaughter in the nineteenth century was the work of a single judge sitting at first instance. This was in the well-known case of *Franklin* (1883) 15 Cox 163, where the accused took up a good-sized box from a refreshment stall on a pier and wantonly threw it into the sea; the box struck a swimmer underneath and caused his death. Field J. directed the jury that the civil wrong against the refreshment-stall keeper was immaterial to the charge of manslaughter, and that the accused could be convicted of this crime only on proof of criminal negligence. The learned judge also expressed great abhorrence of constructive crime, and said that the mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step in a criminal case.

It is sometimes thought that the ruling in *Franklin* must be limited to non-dangerous torts, in order to reconcile it with the earlier ruling in *Fenton* (1830) 1 Lewin 179, which went the other way. But it is submitted that this is not a distinction, because in *Franklin* there was not merely a tort to property but also a tort of negligence in respect of swimmers underneath the pier. This was a dangerous tort, just as much as it was a dangerous tort in *Fenton* to throw large stones down a mine. (That the former was dangerous is shown by the fact that the jury convicted, under the direction of the judge, on the issue of gross negligence.) Although Field J. did not expressly advert to the fact that the tort of negligence had been committed, his denial of the relevance of civil wrongs in criminal cases was wide enough to cover it. Were the commission of the tort of negligence sufficient to turn a killing into manslaughter, the effect would be that the requirement of gross negligence in ordinary cases of manslaughter would disappear. For every killing by ordinary negligence is a tort; and if every tortious killing were manslaughter, it would follow that the jury would never need to investigate on the criminal charge whether the negligence were gross. It must therefore be taken that *Franklin* is irreconcilable with *Fenton*, and that of the two cases *Franklin* is preferable.

In *Franklin* there was not merely a tort but a crime, namely the felony of larceny of the box. Although the point was not mentioned, it is evident that the judge would have regarded this, too, as irrelevant to the crime of manslaughter. The violation of a criminal prohibition cannot found a charge of constructive manslaughter unless the prohibition was designed in some way to preserve life or at least bodily integrity.

The law of constructive manslaughter was not applied where the immediate cause of death was merely grief. Thus where the accused attacked his wife and drove her out of the house, and she died ten days afterwards from a disease, Byles J. ruled that there could be no conviction of manslaughter if it was merely found that death was accelerated by the woman's anguish at being turned out of her home, though conviction was possible if the death was accelerated by the violence (*Murton* (1862) 3 F. & F. 492). It is also of some interest to note that according to an American decision, the law of constructive manslaughter cannot be applied where death results only from exertion, and not at all from fear. The facts of the case in question (*Hubbard v. Commonwealth* (1947) 304 Ky. 818, 202 S.W.2d 634) were that the defendant was arrested for being drunk in a public place; he refused to go peaceably, and lay on the ground, kicking at anybody within reach. The jailer who had hold of his head suffered from a weak heart, and the physical exercise and excitement of the scuffle brought about his death from heart failure. It was held that although the defendant was guilty of an offence in making resistance, he was not in these circumstances guilty of manslaughter. To the eye of common sense this case may seem to be somewhat finely divided from that of a man resisting arrest who *accidentally* kicks his arrester and so causes his death. According to a ruling of Brett J. in *Porter* (1873) 12 Cox 444, such a person is guilty of manslaughter.

The facts of *Noon* (1852) 6 Cox 137 provided an occasion for a rather subtle exercise in the law of remoteness of consequence. D struck his wife P with the flat of his sword; P's child tried to drag P from the room, but P in resisting this accidentally fell upon the sword and was killed. Such, at least, was the theory of the affair put forward by the defence. Cresswell J. directed the jury that if they took this view of the facts they should not convict of manslaughter, unless they thought that the sword was used carelessly. In effect this excludes the doctrine of constructive manslaughter and leaves the case to be determined on the issue of negligence. This issue is quite capable of giving a conviction in suitable cases, and avoids the problem of causation which is apt to arise with constructive manslaughter.

One other limitation was placed upon the doctrine by the old authorities. It was held that an accidental killing by an unlicensed medical practitioner was not manslaughter, even though he was liable to a penalty for practising (*Van Butchell* (1829) 3 C. & P. 629; Russell, 10th ed., pp. 526–530). The reason for this leniency does not clearly appear; possibly it was an application of Foster's theory that the doctrine of constructive manslaughter applied only to acts that were *mala in se*.

The status of the doctrine at the present day

According to one opinion, the doctrine of constructive manslaughter was excised from the law by the decision of the House of Lords in *Andrews* v. *D. P. P.* [1937] A.C. 576. This was to the effect that a man was not guilty of manslaughter merely because he killed in the course of the misdemeanour of dangerous driving; and Lord Atkin appears to have expressed the opinion that killing in the course of an unlawful act is not in itself criminal (at p. 585). If it were otherwise, he said, "a man who killed another while driving without due care and attention would *ex necessitate* commit manslaughter."

This case is contentedly accepted in the two leading practitioners' works, Archbold and Russell, as putting an end to the old law. On this view, the issue in every case of involuntary manslaughter is now one of gross negligence. Would that it were so. There are, however, two other cases, later in date than *Andrews,* which seem to continue the ancient rule.

The first is the decision of the Court of Criminal Appeal in *Larkin* [1943] 1 All E.R. 217 at 219 (the relevant part of the judgment is not reported in the Law Reports version [1943] K.B. 174). The accused found the deceased woman, his mistress, in the company of another man; he drew a razor, as he said to frighten the other man; the woman—again according to the accused's story—fell drunkenly against the razor and so accidentally cut her throat. The judge directed the jury that even if they accepted this view of the facts, the case would still be one of manslaughter, and this direction was upheld on appeal. Humphreys J., delivering the judgment of the Court of Criminal Appeal, said that if death was caused in doing a lawful act, it would not be manslaughter unless there were negligence of a very high degree; and he added that "the expression most commonly used is unless it shows the accused to have been reckless as to the consequences of the act." But where the act which a person is engaged in performing is both unlawful and dangerous (meaning by dangerous an act which is likely to injure another person), and quite inadvertently he causes the death of that other person by that act, then he is guilty of manslaughter. The court thus went back to the ancient authorities on the subject of constructive manslaughter, with the important qualification that they were to be applied only where the act was not only unlawful but dangerous. The effect of *Andrews* upon the old authorities was not considered.

It seems clear that, having regard to *Andrews*, the judgment in *Larkin* cannot be accepted without qualification. The act in *Andrews* was both unlawful and dangerous—it was admittedly the misdemeanour of dangerous driving—yet the House held that this did not automatically make the defendant guilty of manslaughter for a resulting death. Thus the rule in *Larkin* cannot be applied to negligent crimes. Even if the defendant has intentionally violated the criminal law—as if he has intentionally driven beyond a speed limit—it can hardly be imagined that this would *ipso facto* make him guilty of manslaughter for a resulting death, without consideration of the issue of negligence. If dangerous driving does not introduce the law of constructive manslaughter, a trivial excess of a speed limit cannot do so.

The conclusion seems to be that the rule in *Larkin* must be limited to cases where the defendant has been guilty of an assault or battery, or (perhaps) other crime of intention or recklessness against the person (such as the malicious administration of a noxious drug); and even then it applies only when the defendant's act can be said to be dangerous. Limited in this way, the rule is deprived of most if not all of its sting, but then it is difficult to see its utility. What is the difference between doing a lawful act with gross negligence as to the safety of others, and intentionally or recklessly committing a dangerous crime against the person of another? It would seem that any conduct falling within the latter would automatically fall within the former, and, if so, there is no need for the *Larkin* doctrine.

It may also be remarked, with reference to the specific facts in *Larkin*, that the court seems not to have been apprised of the ruling in *Noon* (above, p. 298), where the legal question was very much the same and the law of constructive manslaughter was held not to apply.

The other decision that seems to revive the old law of constructive manslaughter is the decision of the Privy Council in *Kwaku Mensah* [1946] A.C. 83 at 91. It is remarked in the course of the judgment in that case that to point a gun for the purpose of frightening another without legal excuse is an assault even though the actor does not know the gun to be loaded, and so is an unlawful act; if then the gun happens to be loaded and is discharged accidentally, killing the person at whom it is pointed, this is manslaughter. For this proposition two old cases are cited: *Jones* (1874) 12 Cox 628, and *Weston* (1879) 14 Cox 346. It may be mentioned, however, that the first of these two cases proceeded upon negligence rather than on constructive manslaughter, while the second does not specify between these two doctrines. Owing to the high duty of care imposed upon those who handle firearms, there would generally be little difficulty in finding gross negligence on facts like those contemplated, so that there is hardly any need to introduce the question of constructive manslaughter.

The conclusion may be drawn that, whatever opinion the House of Lords intended to express in *Andrews*, their decision has failed to make this part of the law reasonably clear and satisfactory. One day, perhaps, their Lordships will be given another opportunity to consider the subject, and we may then find that the law is much simpler than we thought. Justice could be done in all these cases if it were recognised that every charge of involuntary manslaughter requires proof of the requisite degree of criminal negligence, and that this negligence always means negligence as to the death—not negligence as to a consequence short of death.

Right of Examining Justices to Add Charges

By F. G. HAILS, *Solicitor, Clerk to the Dartford Justices*

The Magistrates' Courts Act, 1952, s. 25, which replaces the provisions of the Summary Jurisdiction Act, 1879, s. 17, as amended by the Criminal Justice Act, 1948, provides that a person over the age of fourteen years who is charged before a magistrates' court with a summary offence (other than an assault or an offence under the Vagrancy Act, 1898, s. 1), which carries a sentence of more than three months' imprisonment has a right, if he appears in person to answer the charge, to claim to be tried by a jury. It is not necessary for the purposes of this article to inquire fully into the procedural and other provisions of this section, save to remark that subsection (6) provides that where the defendant does elect to be tried by a jury " the court shall . . . deal with the information in all respects as if it were for an offence punishable on conviction on indictment only " and that the offence " shall as respects the accused be deemed to be an indictable offence."

The duties of a magistrates' court when dealing with an indictable offence as examining justices are laid down by sections 4 to 11 of the Act of 1952, amplified by the Magistrates' Courts Rules, 1952, rr. 5 to 13, and here again only one is material, section 7 (1): " Subject to the provisions of this and any other Act relating to the summary trial of indictable offences, if a magistrates' court inquiring into an offence as examining justices is of opinion, on consideration of the evidence and of any statement of the accused, that there is sufficient evidence to put the accused upon trial by jury for any indictable offence, the court shall commit him for trial; and, if it is not of that opinion, it shall, if he is in custody for no other cause than the offence under inquiry, discharge him."

R. v. *Brown, R.* v. *Phillips*

Occasionally a magistrates' court inquiring as examining justices, the offence charged being indictable only by virtue of a claim to jury trial by the accused under section 25 of the Act of 1952, is faced with the dilemma as to whether it can commit on other charges either in addition to, or in substitution for, the original information. The question is dealt with in Stone's *Justices' Manual,* 88th ed., Vol. 1, p. 59, note (*m*), as follows:—" If a defendant elects to be tried by a jury, the indictment may contain any charges beyond the offence charged in the information which are disclosed in the depositions (*R.* v. *Brown* [1895] 1 Q.B. 119) but another charge may not be substituted for the charge upon which he elected trial by jury (*R.* v. *Phillips* [1953] 1 All E.R. 968)." It is our purpose here to examine the powers and duties of examining justices in the light of these two cases, and it is quite apparent that on reading the respective headnotes Stone is correct, for that to the *Justice of the Peace* report of *R.* v. *Brown* (117 J.P. 235) says: " Where an accused person is summoned before justices in respect of an offence triable summarily and elects under section 17 of the Summary Jurisdiction Act, 1879, he may be committed to take his trial in respect of any indictable offence disclosed by the depositions even for offences for which he was not summoned before the justices, provided the case does not fall within 22 & 23 Vict. c. 17, or 30 & 31 Vict. c. 35, s. 1." The proviso no longer applies, as the two Acts in question, the Vexatious Indictments Act, 1859, and the Criminal Law Amendment Act, 1867, s. 1, were repealed by the Administration of Justice (Miscellaneous Provisions) Act, 1933. The findings of the court as set out in the headnote to *R.* v. *Phillips* at [1953] 1 All E.R. 968 were as follows: " Held, if a prisoner elects to go for trial before a jury under section 17 (1) of the Summary Jurisdiction Act, 1879, another charge cannot be substituted at quarter sessions for the charge for which he was originally before the court of summary jurisdiction, and therefore the conviction must be quashed."

R. v. *Brown*

But as so often happens, the headnotes do not tell the whole story: *R.* v. *Brown* was a case stated to the Queen's Bench Division under the old Crown Cases Reserved procedure, before the establishment of the Court of Criminal Appeal, and for some reason it does not appear to have been cited to the Court of Criminal Appeal in arguing *R.* v. *Phillips*: at any rate, it is not referred to in the report which we have quoted. In the older case it is not clear from the report whether the extra charges of which the defendant complained were added by the magistrates or on the indictment: at that time it was necessary before adding counts to the indictment to obtain leave of the trial court, and it is arguable from the passage which we are about to quote that this was not done in this case and if this is so the charges must have been added by the examining justices. The leading judgment in *R.* v. *Brown* was given by Lord Russell of Killowen C.J., and the passage which sums up the matter reads ([1895] 1 Q.B. 126): "The contention on behalf of the defendant seems to be based upon some confusion between those proceedings before magistrates, which are essentially summary proceedings upon which the magistrates will themselves adjudicate, and cases where the magistrates are merely exercising their jurisdiction with a view to sending the case for trial before a different tribunal. It is clear that under [the Summary Jurisdiction Act, 1848], which relates to summary jurisdiction only, a person can only be dealt with upon the one charge which is embraced by the summons; if any further charge arises in the course of the proceedings, or any variance appears between the charge and the evidence, the magistrates can either authorise the issue of a fresh summons, or they can, by adjourning the case, give time to the accused person to meet the altered state of things. But [the Indictable Offences Act, 1848], which deals with cases with which the magistrates are not intending to deal summarily, but which they are putting in train to send elsewhere, has a set of provisions which contain some important differences; for instance, under section 25, if the evidence is, in the opinion of the magistrates, not sufficient to put the accused party upon his trial for *any* indictable offence, he is to be discharged; if they consider it sufficient, they are to commit him for trial. The difference between the two cases is obvious: in the one, the magistrates straightway exercise their jurisdiction over the offence; in the other, the accused is sent for trial before a different tribunal, and has full and ample notice before his trial of the character of the offences with which he is charged. When a case is sent for trial, the real question to be considered is whether the evidence on the hearing of the summons covers and justifies the counts of the indictment. It is common knowledge that application is frequently made to the tribunal to which the accused is sent for trial for leave to add to the indictment additional counts, based on the evidence contained in the depositions. . . ." With this judgment the other sitting judges, Hawkins, Wright and Collins JJ., concurred. The argument is perfectly clear: once a defendant elects to be tried by a jury, he is subject to the law relating to indictable offences in every respect, even if it is disadvantageous to him: and of course the prosecution need not necessarily offer evidence on the original charge if others are preferred.

R. v. *Phillips*

But *R.* v. *Phillips* takes a different line: here it is true that the charge on which the defendant elected to go for trial was omitted from the indictment, a course which is authorised by the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (2) (i) on a committal for trial, but it is held that as he elected to go to a jury, on a summary case, he is in a better position than a defendant in any other indictable case. The judgment of the court was delivered by Lord Goddard C.J. who concluded: "This court cannot approve of such a course being taken because, if we did, it would really be making the option which was given to the appellant by section 17 (1) of the Summary Jurisdiction Act, 1879, something in the nature of a trap. Had he chosen to be dealt with by the magistrates, and been convicted by them, he could not afterwards have been prosecuted under [the substituted charge]. This court cannot approve of a charge being substituted for the charge on which the prisoner was originally before the magistrates in any case where quarter sessions only get jurisdiction by reason of the prisoner having exercised his option under section 17 (1) of the Summary Jurisdiction Act, 1879. The conviction of this indictment is, therefore, quashed."

It seems to us beyond argument that, whatever the technical limitations of the two judgments to the two points expressly decided, these passages make it quite clear that in fact one flatly contradicts the other. Moreover, neither passage has been picked out of its context to add force to an argument. We are sure that if *R.* v. *Brown* had been brought to the notice of the court in *R.* v. *Phillips* then there would have been some explanation of the different view: It seems that the note in Stone to which we have referred is technically accurate, but it is clear that the position is unsatisfactory, for so long as *R.* v. *Brown* remains it will always be possible to circumvent *R.* v. *Phillips* by preferring charges in alternation rather than substitution: then if there is a verdict on a charge which was not before the magistrates at the outset, the very thing which Lord Goddard finds so exceptionable will occur.

Restitution in Criminal Proceedings

By C. HOWARD, LL.M.

Although the subject is of considerable practical importance, there appears to be no convenient account of the law relating to restitution of property in criminal proceedings. The omission is surprising, and probably results from restitution in this context being one of those legal hybrids which, compounded of both civil and criminal law, are disowned by specialists in either field.

When a crime is committed in relation to property the ownership of the property is usually not affected. If A takes B's watch and unlawfully sells it to C, the general rule is that the watch still belongs to B. A cannot pass to C a title better than his own: *nemo dat quod non habet*. To this general rule there are exceptions. If A steals B's watch and sells it to C, an innocent purchaser, in market overt, C acquires a good title to the watch at common law. If A obtains B's watch by fraud not amounting to larceny he has a voidable title to it, and, until the original transaction is repudiated by B, can pass a good title to an innocent purchaser. The Factors Act, 1889, s. 2, enables mercantile agents to pass a good title to goods of which, or of the documents of title to which, they are in possession with the consent of the owner. Sections 8 and 9 of the Factors Act, and sections 25 and 47 of the Sale of Goods Act, 1893, enable a seller or buyer in possession after sale to do likewise. Finally, good titles are obtained by bona fide transferees for value of negotiable instruments and persons who innocently receive money in currency.

If there were no other law on the subject, questions of restitution would be indistinguishable from any other problems of title to goods. They would be determined in the civil courts by reference to these rules and by means of actions for conversion. However, the legislature has interfered with this position in two ways. First, the Sale of Goods Act, s. 24 (1), abrogates the market overt rule where the thief is prosecuted to conviction. Second, the Larceny Act, 1916, s. 45 (1) and (2), empowers criminal courts in certain circumstances to order restitution without bringing the civil courts into the matter at all. Although no absolute distinction can be drawn, the former may be conveniently treated as a change in the substantive law and the latter as its procedural complement. A minor provision, the Pawnbrokers Act, 1872, s. 30, confers certain additional powers upon the court where the goods have been pawned.

These three statutes will be considered in turn.

The Sale of Goods Act, 1893, s. 24, provides:

> (1) Where goods have been stolen and the offender is prosecuted to conviction, the property in the goods so stolen revests in the person who was the owner of the goods, or his personal representative, notwithstanding any intermediate dealing with them, whether by sale in market overt or otherwise.
>
> (2) Notwithstanding any enactment to the contrary, where goods have been obtained by fraud or other wrongful means not amounting to larceny, the property in such goods shall not revest in the person who was the owner of the goods, or his personal representative, by reason only of the conviction of the offender.

The Larceny Act, 1916, s. 45, provides:

> (1) If any person guilty of any such felony or misdemeanour as is mentioned in this Act, in stealing, taking, obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving, any property, is prosecuted to conviction by or on behalf of the owner of such property, the property shall be restored to the owner or his representative.
>
> (2) In every case in this section referred to the court before whom such offender is convicted shall have power to award from time to time writs of restitution for the said property or to order the restitution thereof in a summary manner:
>
> Provided that where goods as defined in the Sale of Goods Act, 1893, have been obtained by fraud or other wrongful means not amounting to stealing, the property in such goods shall not revest in the person who was the owner of the goods or his personal representative, by reason only of the conviction of the offender:
>
> And provided that nothing in this section shall apply to the case of—
>
> (*a*) any valuable security which has been in good faith paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, has been in good faith taken or received by transfer or delivery by some person or body corporate for a just and valuable consideration without any notice or without any reasonable cause to suspect that the same had been stolen;
>
> (*b*) (the offences of conversion, conversion by trustees, and

factors obtaining advances on the property of their principals).

Before considering the Larceny Act, s. 45, in detail, four matters particularly related to the Sale of Goods Act, s. 24, will be examined: the nature of the title arising under s. 24; fraud; mercantile agents; and hire-purchase.

Title to Property

The title to stolen property obtained by successful prosecution is a new one which arises on conviction and not before.[1] It follows that this title avails to support an action of conversion against a third party only if the property is in his hands at the time of conviction. The point is illustrated by *Horwood* v. *Smith* (1788) 2 Term Rep. 750. A sheep had been stolen from the plaintiff. After the theft, but before the arrest of the thief, the defendant bought it in good faith in market overt. On the arrest of the thief the plaintiff notified the defendant of the state of affairs. In spite of this the defendant resold the sheep before the trial. The thief was duly convicted and executed. Relying on title by virtue of 21 Hen. 8, c. 11,[2] the plaintiff brought trover against this defendant for the sheep, but he failed. The defendant had obtained a good title in market overt. Before the plaintiff had obtained a better one, the defendant had ceased to have anything to do with the sheep. The plaintiff's new title did not relate back to alter this. For the same reason the notice given was of no effect. Similarly, in *Walker* v. *Matthews* (1881) 8 Q.B.D. 109 a third party who lost his acquired title to cattle failed on a counterclaim for the expense of keeping them during the period between his purchase and the conviction of the thief; for the court said he could not claim for the expense of keeping his own property!

This reasoning only applies to the title which results from the conviction. If the plaintiff has never lost his original title the case is different. This point was settled in *Peer* v. *Humphrey* (1835) 2 A. & E. 495 where the plaintiff's servant had feloniously sold some of his cattle to the defendant, but not in market overt. The plaintiff notified the defendant of the true state of affairs and demanded the cattle. The defendant ignored this demand and resold them. After conviction of the servant the plaintiff succeeded in trover because he was able to rely on having been the true owner at the time he gave notice. *Horwood* v. *Smith* was distinguished on the ground that there the first sale had been in market overt. It follows in either case that a third party who retains the property after the conviction is open to an action for conversion, and since this depends on the substantive law it matters not at all that no restitution order was made at the trial.[3]

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[1] *Lindsay* v. *Cundy* (1876) 1 Q.B.D. 348, 358, *per* Blackburn J.

[2] The original ancestor of the revesting rule.

Acquittal can give the dire tort of conversion even more capricious scope. In *Winter* v. *Bancks* (1901) 19 Cox C.C. 687 A complained to the police that he had lost his gig. It was found in the possession of B. The police took charge of it while B was tried for larceny, and retained it after his acquittal. Solicitors for both A and B wrote demanding the vehicle. An unfortunate policeman, C, acting under orders, handed the embarrassing object back to B as the person from whom it had been taken by the police. A turned out to be the true owner and he successfully sued C for conversion.[4]

Larceny and Fraud

The place occupied in the law of restitution by the distinction between fraud and stealing is an important one. In this respect the Sale of Goods Act, section 24 (2), only reaffirmed the position which, with one temporary aberration which will appear, had arisen at common law. This was as follows.

In *Parker* v. *Patrick* (1793) 5 Term Rep. 175 A obtained goods from B by fraud and pawned them with C, who took in good faith. B prosecuted A to conviction and then retook possession of the goods. C successfully sued B in trover, the court contenting itself by way of judgment with saying that the case was " distinguishable from the case of felony ; for there by a positive statute the owner, in case he prosecutes the offender to conviction, is entitled to restitution." [5] Both the decision and the distinction suffered disapproval in *Peer* v. *Humphrey* (1835) 2 A. & E. 495 but emerged triumphant once more in *Load* v. *Green* (1846) 15 M. & W. 216. Parke B. explained that in *Parker* v. *Patrick* B could have disaffirmed the fraudulent transaction concluded with him by A at any time before A pawned the goods to C. Until B did so, however, A could pass a good title for value to an innocent third party, and that was what had happened. Thus explained, *Parker* v. *Patrick* was again followed in *White* v. *Garden* (1851) 10 C.B. 919 and *Stevenson* v. *Newnham* (1853) 13 C.B. 285, the position reached eventually receiving the approval of the House of Lords in *Cundy* v. *Lindsay* (1878) 3 App.Cas. 459. It is now in statutory form in the Sale of Goods Act, s. 23.

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[3] These points are well illustrated by *Scattergood* v. *Sylvester* (1850) 15 Q.B. 506.

[4] The moral of this tale is to remember the Police (Property) Act, 1897. See also *Bullock* v. *Dunlap* (1876) 2 Ex.D. 43.

[5] The statute was 21 Hen. 8, c. 11.

Apart from the special cases of negotiable instruments and money, the only other way in which an offender could pass a good title at common law, and the only way in the case of a thief, was by sale in market overt. The restitution statutes [6] had for many years abrogated this ancient rule in favour of a successful prosecutor. It is therefore rather surprising to find in *Horan* (1872) Ir.R. 6 C.L. 293 (Crown Cases Reserved, Ireland) an attempt, unsuccessful, to oppose a restitution order on the ground that there was no power to restore on a conviction for larceny where there had been an intervening sale in market overt. The application for a restitution order in that case was made under the Larceny Act, 1861, s. 100. This enactment was destined to cause trouble in a different way. In *Bentley* v. *Vilmont* (1887) 12 App.Cas. 471 the House of Lords reluctantly felt obliged to decide that its wording had the effect of revesting in a successful prosecutor goods obtained from him by fraud not amounting to larceny. This legislative breach with tradition, certainly inadvertent, was set to rights by the Sale of Goods Act, s. 24 (2), after an interval, brief by English standards, of only six years. A determination in future to abide by their Lordships' wisdom was reaffirmed by the first proviso to the Larceny Act, 1916, s. 45 (2).

It is submitted, however, that section 24 (2) was framed to correct *Bentley* v. *Vilmont* and to do no more.[7] This would be the point of the word "only" in the phrase "by reason only of the conviction." The principal case is *George* (1901) 65 J.P. 729. The accused pleaded guilty to obtaining a £50 cheque which he had converted into five £10 notes. These he wished to return to the prosecutor. The question was whether, in view of section 24 (2), the court had power to order their restitution. The Common Serjeant accepted the following argument. Since section 24 (2) says "only" it does not affect any other reason than conviction for property revesting in the original owner. In a fraudulent transaction the party defrauded can cause the property to revest in him by disaffirming the contract, provided he does so before innocent third parties have acquired rights in it. The act of prosecution is in itself a disaffirmation of the contract. Therefore a restitution order could be made.[8] This particular case could have been disposed of on a narrower ground. Section 24 does not apply to

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[6] The first one on the subject was 21 Hen. 8, c. 11. Thereafter 7 & 8 Geo. 4, c. 29, s. 57, and 24 & 25 Vict. c. 96, s. 100 (Larceny Act, 1861), the immediate predecessor of the Sale of Goods Act, 1893, s. 24, and the Larceny Act, 1916, s. 45.

[7] See Chalmer's *Sale of Goods Act*, 1893, 12th ed. (1945), p. 90.

[8] Anticipated in *Re Vautin* [1899] 2 Q.B. 549? See also *Re Koenig* (1894) 58 J.P. 641.

"things in action and money." [9] The cheque of which the £10 notes were the proceeds was therefore clearly outside it. However, this does not invalidate the argument of the Common Serjeant, which is of general application and has in fact been adopted in a later case where "goods" proper were involved.[10]

An alternative explanation of the word "only" has been put forward. Where goods or property are taken in the possession of the offender it does not matter whether he is guilty of obtaining by false pretences or, *a fortiori,* larceny. In either case the owner has an unimpeachable claim. But where an innocent purchaser from the offender is involved a neat question can arise. If there is a conviction for larceny he has no title. If the conviction is for obtaining by false pretences on evidence which proves no more, any title he may have is undisturbed. Into which category does the situation fall when the evidence discloses larceny but the conviction is for obtaining? [11] In *Walker* (1901) 65 J.P. 729 the Recorder thought that "the only intelligible . . . meaning" to be ascribed to "the ambiguous language of this section" was to suppose it designed to deal with this situation. His argument was that the word "only" was inserted to enable the courts to look at the facts behind the formal conviction in the statutory case where there might by proof of one offence, affecting title to property, but conviction for another, not affecting title to property. *Walker* is often cited as though an order were actually made in it on a conviction for obtaining because the facts amounted to larceny.[12] In fact the opposite occurred: no order was made because the facts did not amount to larceny. The Recorder's opinion was therefore *obiter*.

This is unfortunate because the suggestion that a restitution order can be made in these circumstances is interesting. One need not accept the Recorder's views on the word "only." Section 24 (2) is perhaps drafted ambiguously, but it is submitted that the interpretation put forward in *George* is satisfactory and should be adhered to. Moreover, it is perfectly reasonable to argue that a restitution order can be made where there is a conviction for obtaining in circumstances disclosing larceny without bringing the word "only" into it at all. It is submitted that in such a case an order can be made because no one is prejudiced thereby. If it could not be made, the owner would still be able to sue the third party. There would be no objection to the finding of larceny by a civil court since the criminal court would already have come to the same conclusion in everything but name. There is, therefore, no reason why the order should not be made in the first place. It might be objected that only the conviction can prove what offence was committed. For the reason just given this is thought to ignore realities. Moreover, section 44 (3) and (4) of the Larceny Act support this view.

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[9] Sale of Goods Act, s. 62 (1).

[10] *Cohen* (1907) 71 J.P. 190.

[11] Under the Larceny Act, 1916, s. 44 (4).

[12] *e.g.,* Archbold's *Criminal Pleading,* 33rd ed., para. 523; Halsbury's *Laws,* 3rd ed., Vol. 10, p. 818, para. 1580, note (*a*).

Walker was distinguished in *Bianci* (1903) 67 J.P. 443. In that case the accused pleaded guilty to both larceny and obtaining. The commissioner held that the conviction for larceny enabled him to make an order for restitution without reference to the conviction for obtaining.

Mercantile Agents[13]

An interesting situation arises where the revesting law has to be read in conjunction with the enactments enabling the apparent owner of goods to pass a good title to an innocent purchaser.[14] If the apparent owner is convicted of larceny as a bailee or larceny by a trick, the clear words of the Sale of Goods Act, s. 24 (1), would seem to defeat the title of a purchaser. However, as far as civil courts are concerned, it is well established that the criminal conviction may be disregarded in considering whether the requirements for the passing of an apparent title have been satisfied.[15] This seems to ignore the language of the section, which indicates that even if such a title had passed it would necessarily be defeated on proof of a conviction for larceny. The courts have surmounted this difficulty by relying on the well-established rule that in trying an action a civil court must have reference only to the evidence before it, and is in no way bound by a previous finding in a criminal court.[16]

This is well illustrated by *Buller & Co.* v. *Brooks* (1930) 46 T.L.R. 233, where there had been a previous conviction for larceny of jewellery, upon which the plaintiffs expressly relied as having revested the property in the jewellery in them. Wright J. held that the action failed on his finding that the criminal offence was obtaining and not larceny. The authorities on the Factors Act, too well known to need repetition here, must therefore be taken to have established that where the title to property has passed by virtue of an enactment enabling the apparent owner of such property to pass, such title is not affected by the revesting rule.

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[13] Which heading includes for the present purpose buyers and sellers in possession.

[14] Factors Act, 1889, s. 2; Sale of Goods Act, 1893, ss. 25 and 47.

[15] *Folkes* v. *King* [1923] 1 K.B. 282; *Pearson* v. *Rose* [1951] 1 K.B. 275; *Du Jardin* v. *Beadman Bros.* [1952] 2 All E.R. 160.

[16] *Buller & Co.* v. *Brooks* (1930) 46 T.L.R. 233, 234, *per* Wright J.; *cf.* the judgment of Lord Goddard in *Hollington* v. *Hewthorn* [1943] K.B. 587, and Sachs J. in *Ingram* v. *Ingram* [1956] 2 W.L.R. 782, 790–793; and see also 18 *Modern Law Review* 231.

Hire-Purchase

This topic may be briefly referred to here because of its practical importance. Under the type of agreement invariably used nowadays[17] the seller of goods on hire-purchase remains the owner of them, the purchaser being merely a hirer with an eventual option to buy. Therefore, the Factors Act does not apply.[18] Therefore, if the hirer is convicted of larceny as a bailee for unlawfully disposing of the goods he has under the agreement, either the title to them remains with the seller under the rule *nemo dat quod non habet*, or else it revests in the seller on conviction, after an intervening transaction in market overt, by virtue of the Sale of Goods Act, s. 24 (1).

Larceny Act, section 45

Attention may now be turned to the Larceny Act, 1916, s. 45. This is the principal enactment in English law on restitution, and is in daily use in magistrates' courts. The section consists of a direction that in certain circumstances, and subject to three express limitations, property shall be restored to its owner. The court is given power to order this. So far as the section goes it is valuable, but it is unduly restrictive and poorly drafted. Some preliminary criticisms may be made of the wording of subsection (1) and of the operative part of subsection (2).

The drafting of subsection (1) is verbose and circumlocutory. The enumeration of ways in which offences set out in the Act may be committed is superfluous. Indeed, in the case of " converting " it is nonsensical, for conversion is expressly excluded here by proviso (*b*) in subsection (2). Fortunately, the courts have never been tempted into obscurity by attaching any importance to these repetitions. On the contrary, in the only reported English case where the opportunity to do so presented itself, it was not taken. This case was *Jones* (1881) 14 Cox C.C. 528, where the accused was indicted under the Post Office Act, 1837, for stealing a letter containing two £10 notes. He pleaded guilty, and counsel for the prosecution applied for £7 9s. 6d. taken from the accused on arrest to be handed to the Postmaster-General, the notes not having been recovered. Fry J. refused to make the order. One of the grounds of his refusal was that he had no power to do so because the indictment did not charge an offence specified in the Larceny Act.[19] Counsel contended that the offence charged "comprised" simple larceny and was, therefore, covered by the words "in stealing." This argument was rejected. The ruling phrase was "mentioned in this Act."

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[17] Since *Lee* v. *Butler* [1893] 2 Q.B. 318.

[18] *Helby* v. *Matthews* [1895] A.C. 471.

Similarly, forgery not being an offence mentioned in the Larceny Act, no goods obtained thereby can be restored under section 45.[20] In contrast, the Queensland Criminal Code Act, 1899, dealing in section 685 with restitution, speaks in general terms of offences "of which the unlawful acquisition of property . . . is an element," and covers property "derived, directly or indirectly, from such unlawful acquisition." This has been held to permit the restitution to a bank of money obtained from it by a forged cheque.[21] It is preferable to the English rule. There is no obvious virtue in restricting restitution to stolen property.

To return to the phraseology of subsection (1), the words "guilty" and "prosecuted to conviction" merely mean "convicted," and "such felony or misdemeanour as is mentioned in" is only an extended way of saying "offence under." Finally, the phrase "by or on behalf of the owner of such property" could have been omitted altogether.[22]

Subsection (2) is remarkable for its reference to writs of restitution. This is surely one of the most striking examples of deference by a consolidating legislator in our law. In *Golightly* v. *Reynolds* (1772) Lofft. 88 Lord Mansfield said (at p. 90): "I don't believe there has been a writ of restitution these 200 years." He was rather wide of the mark, for the last recorded instance of a writ of restitution in England is *Burges* v. *Coney* (1697) Trem.P.C. 315.[23] The utility of such a writ was appreciated in Australia, however, as recently as 1889. In *Main* v. *Haskin* (1889) 10 A.L.T. 276 Williams J. settled one in English for the restoration of land, wrongful possession of which had been taken under a judgment of the court "irregularly obtained." It is not thought that these cases provide sufficient justification for continuing to encumber section 45 with power to indulge in an archaic procedure.[24]

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[19] At that time the Larceny Act, 1861, where the relevant wording was the same in s. 100.

[20] *Cf. Rolfe* (1889) 53 J.P. 823. See also *Re Neustadt* (1883) 16 S.A.L.R. 17; 5 A.L.T. 27 (Supreme Court of South Australia).

[21] *Eggers* [1909] Q.W.N. 8.

[22] See the Prosecution of Offences Act, 1879, s. 7.

[23] The writ in this case may be inspected, and compared with a similar writ in Latin, in the reporter's interesting note to *Golightly* v. *Reynolds*.

[24] *Cf. Macklin* (1850) 5 Cox C.C. 216.

These preliminary criticisms give rise to the suggestion that subsections (1) and (2) might, without any danger of ill-considered reform, be altered to read as follows:

> "If any person is convicted of an offence of which the unlawful acquisition of property is an element, any property obtained, directly or indirectly, from such unlawful acquisition shall be restored to the owner, and the court before whom the offender is convicted shall have power to order such restitution in a summary manner."

Orders of Restitution

(i) *When made*

One must not be misled by the "shall" of subsection (1) into supposing that the order of subsection (2) *must* be made in a proper case. The correct interpretation is that although the former subsection affirms the right of the owner to have his property back, the latter gives the court of conviction a discretion whether to afford him the amenity of a summary order for restitution.[25] This view is supported by a careful reading of the text and is, moreover, consistent with the general rule in English law that specific restitution of a chattel is in the court's discretion.[26]

It has sometimes been argued by counsel that refusal to make an order sets up a bar to a civil action, or, alternatively, that failure to apply for an order constitutes such a bar. This has never been the law. Subsection (2) merely provides a summary method of restoring the property which the court of conviction may employ if it sees fit; but the status of this relief is procedural, not affecting the substantive rights of the parties one way or the other. Patteson J. put the matter succinctly when he said the "order of restitution is cumulative to the ordinary remedy by action, and is not a condition precedent to such remedy." [27]

(ii) *Enforcement of an order*

Judicial consideration of section 45 has revealed faults both of ambiguity and of omission. Perhaps the most striking of the latter is the absence of any reference to the enforcement of orders. It seems that the court is left to its power of attachment for contempt.[28] The only reported case in which disobedience to a restitution order has arisen is *Wollez* (1860) 8 Cox C.C. 337, and there the matter was settled by making absolute a rule nisi for the attachment of the offender for contempt. In practice, the problem must rarely arise. If the property can be traced at all the police will have taken possession of it for identification at the trial as part of the case for the prosecution. Nevertheless, in principle it is desirable clearly to specify the court's powers in this regard. Unnecessary scope for the invocation of contempt of court is not welcome. Should production of the property in the first place present a problem, a *subpoena duces tecum* might be of assistance.[29]

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[25] *Vilmont* v. *Bentley* (1886) 18 Q.B.D. 322, 327, *per* Lord Esher; *Buller* v. *Brooks* (1930) 46 T.L.R. 233, 234, *per* Wright J.

[26] *Chilton* v. *Carrington* (1855) 15 C.B. 730, 740, *per* Maule J.; *Peruvian Guano* v. *Dreyfus* [1892] A.C. 166, 176, *per* Lord Macnaghten.

[27] *Scattergood* v. *Sylvester* (1850) 15 Q.B. 506, 511. See also *Wollez* (1860) 8 Cox C.C. 337, 341. If an action for damages is brought, of course, the civil court tries it untrammelled by the findings and verdict in the criminal trial: see note 16 above.

It has been held in America that a restitution order of the criminal court can be enforced against the deceased's estate if the offender dies without obeying it.[30] This rule brings no obvious advantage in its train. However, if the case should arise in this country it might be difficult to avoid reaching the same conclusion, because the order would almost certainly have been directed against the offender *in personam*. It should be open to the owner in such a case to apply to the court for another or an amended order directed to the personal representatives. There is nothing in the wording of subsection (2) to prevent this.[31]

(iii) *Rescission of an order*

In the case of *Wollez*, already referred to, power to rescind an order of restitution was also considered. The order had been made in the Central Criminal Court in the previous session. As a counter to the rule for attachment, a rule nisi for rescission had been obtained. The question of jurisdiction to rescind was therefore not settled, success with the first rule necessarily involving discharge of the second one. However, Mr. Commissioner Kerr was of opinion that he could have rescinded because the order had been "made in the exercise of the general jurisdiction of the court" (8 Cox C.C. 342). Whether or not his opinion was right, the reason for it was wrong. *London Corporation* (1869) L.R. 4 Q.B. 371 decided that there is no general jurisdiction in the High Court to make orders of restitution. A court can only make such orders if power to do so has been specifically conferred upon it by statute. This is because at common law writs of restitution could only be awarded as part of the judgment on an appeal of robbery. When these appeals were abolished [32] the common law power to restore disappeared as a necessary consequence. Successive statutes [33] increased the number of offences to which restitution applied, but never conferred jurisdiction to order it upon any court other than the court of conviction in the particular case.

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[28] R.S.C., Ord. 14, r. 7.

[29] For summary courts see Magistrates' Courts Act, 1952, s. 77 (1).

[30] 24 *Corpus Juris Secundum*, p. 1258, quoting *Re Gardner's Estate*, 94 *Pennsylvania Superior Court* 45.

[31] The Law Reform (Miscellaneous Provisions) Act, 1934, s. 1 (1), does not help because it requires a cause of action, and a restitution order is not a cause of action.

It is submitted that, apart from his reasons, Mr. Commissioner Kerr's opinion was wrong in principle. Normally a judge has no power to withdraw an order after it has been formally drawn up, passed and entered, although he can do so before that time.[34] There seems to be no ground for distinguishing orders of restitution from any others in this respect. The commissioner considered the question to be devoid of practical importance, because the court could always refuse to enforce its order. This will not bear examination. If it is desired to have a restitution order rescinded the proper way to do so is by appeal.

(*To be continued*)

Practice and Procedure

Postponed Sentence

On March 4, 1957, the Lord Chief Justice, sitting in the Court of Criminal Appeal, made the following observations with regard to postponement of sentence in a case where quarter sessions had postponed sentence for twelve months. The deputy chairman, taking the view that the accused had been under the influence of a co-defendant, had told the accused: " We are going to try a course with you to which we hope you will respond. We are postponing sentence on you for twelve calendar months. If you commit an offence during that twelve months well then, of course, you will be dealt with for it and you will be brought here and we shall deal with you ; but if, at the end of that time, there is a good report about you, then I can assure you that this court will take such a course that you will be able to get back a decent character." The Lord Chief Justice said that a postponed sentence in this case was undesirable. As there was provision in the Criminal Justice

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[32] In 1819 by 59 Geo. 3, c. 46.

[33] For their identity, see footnote 6 above.

[34] *Re Harrison* [1955] 2 W.L.R. 256 ; *Re St. Nazaire Co.* (1879) 12 Ch.D. 88 ; *Hedger* v. *Shutler* (1942) 139 E.G. at 387 ; *cf. Jones* [1929] 1 K.B. 211.

Act, 1948, for conditional discharge, that was the method which should have been adopted, or the defendant should have been bound over or put on probation. Had a conditional discharge been given, the defendant, if he had not committed a further offence within twelve months, would have been free of the charge. As it was, the defendant had been let out, not on bail, and the whole matter was in the air. A suspended sentence was not yet known in this country.[1] [H. P.]

Change of Plea

An interesting point of procedure arose recently at the Central Criminal Court in the case of *R.* v. *Dutt*, tried before Judge Aarvold on January 18 and January 21 of this year.

Dutt was indicted on two counts, one of causing grievous bodily harm with intent to cause grievous bodily harm, contrary to section 18 of the Offences against the Person Act, 1861, and one of assault occasioning actual bodily harm, contrary to section 47 of the same Act.

He pleaded to the indictment in the absence of the jury and his plea was Not Guilty to the first count and Guilty to the second. As this was not accepted he was tried upon the first count.

At the conclusion of the case for the defence all the evidence relevant to either count had emerged during the trial of the first count, and as a result of a consideration of it the judge invited the defence to consider withdrawing the plea to the second count if desired as, upon the whole of the evidence, it would have been possible for the jury to acquit on that count.

Dutt did change his plea, and also said that he pleaded Not Guilty to common assault, the alternative to the second count, and in the event he was convicted on the second count and sentenced to eighteen months' imprisonment.

The interesting point is that it was not until the *whole* of the evidence had been given that the jury knew anything at all about the existence of the second count, and they had listened to the evidence having in mind only its relevance to the first count that they were trying.

The jury, therefore, were invited to try the prisoner on a charge that they knew nothing of until the trial was at an advanced stage.

It was held in the case of *R.* v. *Plummer* [1902] 2 K.B. 339, followed in *R.* v. *McNally* [1954] Crim.L.R. 631, that the judge has a discretion to allow a prisoner to change his plea before sentence. In the former case there was more than one count in the indictment and the prisoner pleaded Not Guilty to some and Guilty to one. However, in that case the prisoner did not apply to change his plea of Guilty until *after* the verdict on the other counts and, therefore, the jury were not, as here, seised of the issue upon which the plea was changed in the middle of the trial. In the latter case the prisoner did not plead Not Guilty, and so the issue as to change of plea did not arise after trial by a jury.

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[1] See *R.* v. *Rowlands*, *The Times*, March 5, 1957.

[M. D. L. Worsley, *Barrister-at-Law*.]

Summary Justice

Animals

Dog. Failing to keep a dog under control during the hours of darkness; fined £5; Whitney: Winsford Magistrates' Court (*Liverpool Echo*, March 4).

Children and young persons

Harbouring two boys who had escaped from an approved school; man burnt their uniforms and provided them with other clothes; fined £3 on one charge, given conditional discharge on a second charge; Franklin: Birmingham Magistrates' Court (*Birmingham Mail*, March 7).

Customs and excise

Diamonds. Attempting to export £9,000 worth of industrial diamonds; fined £5,000 and sentenced to six months' imprisonment; Marcowitch: Dover Magistrates' Court (*The Daily Telegraph*, March 16).

Damage

Maliciously damaging 135 ft. high electric pylon, the property of the Central Electricity Authority, by removing bolts, causing the tower to be dislodged from its foundations; fined £100; Jones: Feltham Magistrates' Court (*The Times*, March 19).

Food and drugs

Fish. Selling catfish as "Scotch halibut"; conditionally discharged, ordered to pay costs; Hill: Worksop Magistrates' Court (*The Daily Telegraph*, March 28).

Intoxicating liquor

Buying intoxicating liquor while under the age of eighteen; fined £1; Emmas: Rhyl Magistrates' Court (*Liverpool Echo*, March 6).

Larceny

Stealing razor-blades worth £369 from his employers; imprisoned for two months; Hudson: Marlborough Street Magistrates' Court (*Evening Standard*, March 22).

Local by-laws

For the purpose of selling newspapers shouting in the street so as to cause annoyance to the inhabitants of the neighbourhood contrary to by-law made in 1900 by the Westminster City Council; fined 10s.; Free: Bow Street Magistrates' Court (*The Times*, March 29).

Richmond Park. Jumping horse over ditch in park and riding outside the permitted area for horse riders; four previous convictions for same type of offence; fined £2 on each charge; Sumowski: Richmond Magistrates' Court (*Evening Standard*, March 28).

Master and servant

Theatre. Absenting himself from theatre without paying or making arrangements for the payment of wages and expenses due to artists engaged by him contrary to Theatrical Employers' Registration Act, 1925; fined £25, order to pay 50 guineas costs; Tracey: Rotherham Magistrates' Courts (*The Times*, March 15).

Petrol

Acquiring petrol without surrendering a valid coupon; two men handed in a petrol coupon dated 1950; each fined £1; Ward, Gardner: Smethwick Magistrates' Court (*Birmingham Mail*, March 28).

Post office

Postman failing to deliver postal packets and delaying letters; said he was tired of delivering football pool circulars and threw them into fire; fined £15; Speake: Birmingham Magistrates' Court (*Birmingham Mail*, March 27).

Railways and ships

Ships. Allowing oil to be discharged from vessel into dock;

master fined £100, ordered to pay £35, the cost of clearing the oil, and £5 15s. costs; Vlastos: Birkenhead Magistrates' Courts (*Liverpool Echo,* March 18).

Road traffic

Bus. Two brothers running coach for workmen carrying nineteen standing passengers, carrying too many people, not following the authorised route, employing an unlicensed public service vehicle driver and aiding and abetting the driver to use the bus without a front number plate; each fined £22 10s.; Evans, Evans: Coventry Magistrates' Court (*Birmingham Mail,* March 13).

Passenger. Carrying three-year-old grand-daughter in front of him on a motor-scooter; fined 10s.; Trueman: Derby Magistrates' Court (*The Times*, March 18).

Shops

Selling articles not permitted on a half-closing day and on a Sunday; local councillor deliberately flouting law to draw attention to its anomalies; fined £6; Proudfoot: Scarborough Magistrates' Court (*The Daily Telegraph*, March 26).

Vagrancy

Collecting money by falsely pretending he was blind; sentenced to three months' imprisonment; Carrington: Southampton Magistrates' Court (*The Times,* March 6).

Case and Comment *

Arson—*Setting fire to caravan—meaning of " building "*

HAWKINS *v.* WILSON [1] (Stourport-on-Severn Magistrates' Court: H. Talboys, Esq., Chairman: December 4, 1956).

The accused was charged with unlawfully and maliciously setting fire to a caravan contrary to section 6 of the Malicious Damage Act, 1861. Evidence was given that after continuous quarrels the man with whom the accused was living said he was leaving her. He left the caravan in which they lived together with their child and went to telephone for a taxi. On his return he found the caravan in flames and the accused later admitted to the police that she had set fire to it. For the defence it was submitted that there was no case to answer. Section 6 referred to the setting fire to a " building." The caravan, a typical old gypsy type of caravan, constructed of wood, upon a base of four wheels and equipped with shafts for the purposes of hauling by horse, was a mobile object or chattel and no more a building than an aeroplane or boat. Counsel for the prosecution contended that the caravan with the degree of site permanency it had acquired, as evidenced by its user, could properly be regarded as a building.

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* Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab.), Barrister-at-Law.

[1] For the prosecution: E. O. Savery, Solicitor, Kidderminster. For the defence: T. E. LaLonde, Solicitor, Kidderminster.

Held, the caravan as described in this case could not be regarded as a building within the meaning of section 6. The case was dismissed.

[C. R. L. Reece, *Clerk to the Justices.*]

COMMENTARY. Sections 1 to 5 of the Malicious Damage Act create felonies of setting fire to buildings of various specified types. These felonies are punishable with life imprisonment. Section 6 creates a felony, punishable with fourteen years' imprisonment, of setting fire to any building not mentioned in the preceding sections. The term " building " has often been interpreted for the purposes of other statutes (see Stroud's *Judicial Dictionary*, 3rd ed., Vol. 1, 347) but the question of a caravan seems never to have been considered by an English court. In any case, the meaning of the term might well vary according to the context of the particular statute. A Victoria court has apparently held that " a caravan kiosk used as a booth for selling goods to which electric light and power were supplied " was a building: Stroud, p. 353.

The decision in the present case seems a reasonable one as section 6 is probably designed to protect structures which are part of the realty and the caravan was a chattel. The accused might, no doubt, have been successfully indicted for a misdemeanour, punishable with two years' imprisonment, under section 51 of the Malicious Damage Act, which provides for malicious injuries to real or personal property " for which no punishment is hereinbefore provided."

Bribery—*Intent—gifts given to servants*

R. *v.* LINDLEY [2] (Lincolnshire Assizes: Pearce J.: February 15, 1957).

L. was charged with corruptly giving gifts of money to servants of a company as a reward, or as an inducement, for setting up a contract for the supply of peas between L. and the company, contrary to section 1 (1) of the Prevention of Corruption Act, 1906.

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[2] For the prosecution: *R. C. Vaughan Q.C., H. G. Talbot* (instructed by the Director of Public Prosecutions). For the defence: *W. A. Sime* (instructed by Taylor, Capes & Co., Doncaster).

Pearce J. directed the jury that L. must have dishonestly intended to weaken the loyalty of the servants to their master and to transfer that loyalty from the master to the giver.

L. was acquitted.

[Miss Jean Fisher, *Barrister-at-Law*.]

COMMENTARY. The Act simply requires that the gift be given corruptly "to any agent as an inducement or reward for doing or forbearing to do . . . any act in relation to his principal's affairs or business. . . ." The dishonest intention required by the direction is presumably Pearce J.'s interpretation of "corruptly."

Children and Young Persons—*Abandonment—neglect—message from father to N.S.P.C.C. that children were alone*

R. *v*. BOULDEN [3] (Court of Criminal Appeal: Lord Goddard C.J., Cassels and Gorman JJ.: March 11, 1957) (*The Times*, March 12, 1957).

B. was convicted at quarter sessions of five offences of wilfully abandoning, and five offences of neglecting, his children contrary to section 1 (1) of the Children and Young Persons Act, 1933, and was sentenced to six months' imprisonment for each offence, the sentences to run concurrently ([1957] Crim.L.R. 182). B., left in charge of their children by his wife, telephoned the N.S.P.C.C., said that his five children were alone at home and asked that somebody be sent to look after them. The society reported to the police and a policewoman was sent to B.'s home where she found the five children alone. B. said that he tried unsuccessfully to find somebody to look after the children. He then telephoned to the police and watched them arrive and take the children; he was there to see the children taken into the custody of someone. On appeal to the Court of Criminal Appeal:—

Held, dismissing the appeal, that in *Mitchell* v. *Wright* (1905) 7 F. (Ct. of Sess.) 568, Lord Dunedin had said that the words "abandoned or deserted the child" pointed at the parent leaving the child to its fate. In the present case there was evidence upon which the jury could conclude that B.'s intention was to clear out and leave the children to their fate, and this court did not intend to interfere. [H. P.]

Children and Young Persons—*Committal to care of local authority —consent of local authority*

R. *v*. DARLINGTON JUVENILE COURT, *ex p*. WEST HARTLEPOOL

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[3] For the appellant: *Quintin Iwi* (instructed by the Registrar, Court of Criminal Appeal). For the prosecutor: *J. S. Abdela* (instructed by Durham & Co.).

CORPORATION [4] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 22, 1957) ([1957] 1 W.L.R. 363; [1957] 1 All E.R. 398).

A supervision order was made by the Darlington justices in respect of a child. The parents and the child subsequently moved to West Hartlepool. The child was again brought before the justices and they, being under the impression that the West Hartlepool Corporation had given its consent as required by section 76 of the Children and Young Persons Act, 1933, made an order committing the child to the care of the corporation. In fact the corporation had not consented to the making of the order. On an application by the corporation for an order of certiorari to quash the order on the ground that no consent had been given, there being in force at the time of the making of the order a supervision order:—

Held, that, where an order was made under section 76 committing a child to the care of a local authority and a probation order or supervision order was in force as respects the child, the committal order should set out on its face that the consent of the local authority had been obtained to the making of the order. As the order in the present case did not recite that the corporation had consented it was bad on its face and should be quashed. [J. D. P.]

COMMENTARY. Section 76 (1) of the Children and Young Persons Act, 1933, provides that " where a probation order or supervision order is in force as respects a child or young person, or the court proposes to make such an order at the same time as an order for committal to the care of the local authority, the last mentioned order shall not be made unless the local authority consent to the making thereof."

Evidence—*Onus of proof—self-defence*

R. *v*. LOBELL [5] (Court of Criminal Appeal: Lord Goddard C.J., Cassels and Gorman JJ.: March 11, 1957) ([1957] 2 W.L.R. 524; [1957] 1 All E.R. 734).

L. was convicted of wounding with intent to do grievous bodily harm and was sentenced to four years' imprisonment. At the trial, L.'s defence was that he had acted in self-defence. L. appealed to the Court of Criminal Appeal against his conviction on the ground that the judge had directed the jury that it was for the defence to establish to their satisfaction the plea of self-defence.

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[4] For the corporation: *W. B. Harris* (instructed by Lewin, Gregory, Mead & Sons for Eric J. Waggott, West Hartlepool). The justices did not appear and were not represented.

[5] For the appellant: *J. R. D. Crichton Q.C., I. R. Taylor* (instructed by A. E. M. West, Manchester). For the Crown: *Sir Noel Goldie Q.C., Donald Summerfield* (instructed by Sharpe, Pritchard & Co. for P. B. Dingle, Manchester).

Held, allowing the appeal, that in directing the jury as he did, the judge had the support of *R.* v. *Smith* (1837) 8 C. & P. 160, where it was said that the onus was upon the defendant to satisfy the jury that the act of self-defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give a reasonable apprehension that his life was in danger. Lord Tucker had said in *Chan Kau* v. *R.* [1955] Crim.L.R. 187, that that passage clearly needed some modification in the light of modern decisions. The cases of *Woolmington* v. *D. P. P.* [1935] A.C. 462 and *Mancini* v. *D. P. P.* [1942] A.C. 1, established that in murder or manslaughter the rule that the onus was on the prosecution permitted of no exception except as to proof of insanity. The truth was that the jury must come to a verdict on the whole of the evidence that had been laid before them, and, if on a consideration of all the evidence they were left in doubt whether the killing or wounding may not have been in self-defence the proper verdict would be not guilty. In the present case the judge had misdirected the jury as to the onus of proof and, accordingly, the appeal would be allowed. [H. P.]

COMMENTARY. In *Woolmington,* Lord Sankey said: "Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt, subject to . . . [matters] as to the defence of insanity and subject also to any statutory exception." The defence in that case was accident and Swift J. directed the jury that, once it had been proved that the prisoner had killed the victim, "that is presumed to be murder, unless the person who has been guilty of the act which causes the death can satisfy a jury that what happened was something less. . . ." The Court of Criminal Appeal held that this was a correct direction and indeed there were strong authorities for it, notably Foster's *Crown Law* (1762), 255. These authorities were overruled by the House of Lords and consequently any case decided before *Woolmington* which holds that there is a burden of proof on the accused should be regarded with suspicion. The principle as stated by Lord Sankey was not confined to murder cases: "No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England, and no attempt to whittle it down can be entertained." Viscount Simon said in *Mancini*: "The rule is of general application in all charges under the criminal law."

This does not mean that the prosecution must rebut common law defences simply because defence counsel raises them. There is a burden on the accused, not to prove anything, but to introduce so much evidence as might raise a reasonable doubt in the minds of a jury as to whether the defence is made out. If the accused can only raise such a doubt he should be acquitted. This burden is sometimes called " the evidential burden."

The *Mancini* and *Chan Kau* cases were applications of the *Woolmington* principle to the defences of provocation and self-defence, respectively. One common law defence to which the principle has not yet been applied is that of duress; indeed there is a dictum in *R.* v. *Steane* [1947] K.B. 997, 1005–1006 to the effect that the burden is on the accused: " Duress is a matter of defence and the onus of proving it is on the accused." This seems to be contrary to the principle of *Woolmington* and it has been suggested (Glanville Williams, *The Criminal Law,* p. 602, n. 9) that the dictum relates only to the evidential burden. This suggestion receives some support from the present case in which the Lord Chief Justice said: " The rule that the onus is on the prosecution permits of no exception except as to proof of insanity."

Grievous Bodily Harm—*Direction to jury—self-defence*

R. *v.* O'TOOLE [6] (Court of Criminal Appeal: Stable, Pilcher and Gorman JJ.: March 25, 1957) (*The Times,* March 26, 1957).

O. and his brother were convicted of inflicting grievous bodily harm with intent, and were sentenced to three years' corrective training and two years' imprisonment respectively. The evidence at the trial was that O. and his brother were in a public house where, on being asked to leave, they attacked the licensee. The defence was that the fight was started by the licensee and that O. and his brother were acting in self-defence. They appealed to the Court of Criminal Appeal on the ground that there was no direction to the jury on the law as to self-defence.

Held, allowing the appeal, that there was a failure to direct the jury on the right that every man had in law to defend himself and that the summing-up was, therefore, defective. [H. P.]

COMMENTARY. See the commentary to *R.* v. *Sharp and Johnson* ([1957] Crim.L.R. 242) and *R.* v. *Lobell* (above, p. 323).

Local Authority—*Consent to order committing child to its care.* See R. *v.* DARLINGTON JUVENILE COURT, *ex p.* WEST HARTLEPOOL CORPORATION, p. 322, above.

Mens Rea—*Causing noxious thing to be taken by another.* See R. *v.* CUNNINGHAM, p. 326, below.

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[6] For the appellant: *Henry Palmer* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *G. Bean* (instructed by the Prosecuting Solicitor, Liverpool).

Offences against the Person—*Administering noxious thing so as to endanger life—malice*

R. *v.* CUNNINGHAM [7] (Leeds Assizes: Oliver J.: March 22, 25, 1957).

The prisoner was charged with larceny of a fixture contrary to section 8 of the Larceny Act, 1916, to which charge he pleaded guilty and also that he unlawfully and maliciously caused to be taken by Sarah Wade a noxious thing, namely coal gas, so as thereby to endanger her life, contrary to section 23 of the Offences against the Person Act, 1861. The prisoner was about to become the tenant of a small terrace house, which he had visited on more than one occasion prior to the day of the offence. The house had in fact at one time been part of the adjoining house, in which lived Mr. and Mrs. Wade, and had been roughly divided from it. On the evening in question the prisoner had entered the house and wrenched out the gas meter in the cellar, breaking it away from the supply pipe. He had then taken the meter away, broken into it and stolen the contents. He left the supply pipe pouring out coal gas directly from the mains into the cellar at a rate in excess of 100 cu. ft. per hour. There was a stop tap near the meter which he could have used (and which eventually was used) to cut off the flow of gas into the cellar. The gas percolated into the adjoining house and affected Mrs. Wade, an elderly lady of sixty-two, to such an extent that her life was endangered. Counsel for the defence argued that (1) the negligence of which the prisoner was guilty was such as would only give rise to a tortious and not a criminal liability; (2) the Offences against the Person Act, 1861, s. 23, provides " whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life . . . etc.," and " cause to be . . . taken " should be construed *ejusdem generis* with " administer " and the wording of section 23 could not reasonably cover the entirely unprecedented circumstances of this case; (3) the prisoner had no *mens rea,* nor was his action malicious in law as he never adverted to the probability of the consequences of his act, which was an act which in itself had no relation to the taking of the coal gas by Mrs. Wade; and (4) the prisoner had no intention to cause injury to Mrs. Wade or to any other person.

Oliver J. directed the jury that it was for them to say whether or not Mrs. Wade's taking of the coal gas was the natural consequence of the prisoner's act, but that on the facts they might well come to the conclusion that the prisoner must have known that gas would percolate through into the adjoining house in which he knew that Mr. and Mrs. Wade lived. " Malicious " was best rendered " wicked " in this context. It was clear that the prisoner had done the act intending to steal, but it was not necessary for the prosecution to prove that the prisoner had actually intended that any other person should take the gas.

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[7] For the prosecution: *J. Stanley Snowden* (instructed by Town Clerk, Bradford). For the defendant: *S. E. Brodie* (instructed by J. R. Phillips, Suddards & Co., Bradford).

C. was convicted on this count and sentenced to five years' imprisonment.

[John M. Collins, *Barrister-at-Law*.]

COMMENTARY. Sections 23 and 24 of the Offences against the Person Act, 1861, both create offences of maliciously administering poison or other destructive or noxious thing. Under section 24, which creates a misdemeanour, the administration must be " *with intent* to injure, aggrieve or annoy." Under section 23, which creates a felony, the administration must be simply " *so as to* " endanger life or inflict grievous bodily harm. The presence of the words " with intent " in section 24 and their absence from section 23 would seem to imply that the only intention required under section 23 is an intention to administer a noxious thing. It has, indeed, been held in a civil case that an intention to endanger life or to inflict grievous bodily harm is not required. *Tulley* v. *Corrie* (1867) 10 Cox 640 was an action for false imprisonment in which the defence was that the plaintiff had committed a felony under section 23. The jury found that a noxious thing had been administered but not with intent to inflict grievous bodily harm; and that grievous bodily harm had resulted. Cockburn C.J. directed a verdict for the defendant and the Court of Queen's Bench refused a rule to enter a verdict for the plaintiff. Mellor J. said: " The mere administration of poison with intent only to injure or annoy is of itself only a misdemeanour; but its administration, if it actually causes grievous bodily harm, or with intent to cause such injury is a felony."

It seems clear from the report of the case in 16 L.T. 796 that the jury found that there was an intent to injure, aggrieve or annoy; but it does not appear from the wording of section 23 that such an intention *need* be proved in order to make out the felony. On the other hand, it is a surprising result that the requirement of *mens rea* should be more stringent in the case of the misdemeanour than in that of the felony.

" Malice " is usually interpreted as requiring either intention or recklessness with respect to those elements in the *actus reus* to which it is held to apply: in this case, the administration and the noxious quality of the thing administered. According to this view an intention to steal would not be malice for this crime: *cf. R.* v. *Pembliton* (1874)

L.R. 2 C.C.R. 119, where an intention to injure a *person* was held insufficient on a charge of malicious damage to *property*. Foresight of the probability that someone's life would be endangered would be enough; and since a man may be taken to foresee—and, indeed, intend—the natural consequences of his acts, there would seem to have been ample evidence of malice in this sense.

Perjury—*False statement in application for subsidy payment*

R. *v*. MAILEY (York Assizes: Diplock J.: February 19, 1957).

The defendant, a sheep farmer, was charged under section 5 (*b*) of the Perjury Act, 1911, with making a false statement in applications claiming subsidy payment for hill sheep under the Hill Farming and Livestock Rearing Acts, 1946 to 1954. It was alleged that the defendant had wilfully and knowingly overstated the number of sheep of various breeds on his farm on the relevant date in such applications. It was submitted by the defence, that as the Perjury Act must be construed strictly, such applications were not within the purview of the section.

Held, no offence had been committed within the meaning of section 5 (*b*).

[A. M. Hurwitz, *Barrister-at-Law*.]

COMMENTARY. Under section 5 (*b*) of the Perjury Act, 1911, the false statement must be knowingly and wilfully made and must be in a document which the accused "is authorised or required to make, attest, or verify, by any public general Act of Parliament. . . ." It seems that it was held that the accused was not "authorised or required" to make the application within the subsection.

It is clear enough that he was not *required* to make the application, but it is not apparent why he was not *authorised* to do so. It seems that "authorised" should be read disjunctively from "required" as subsection (*c*) uses the term "required" only.

Self-defence—*Onus of proof*. See R. *v*. LOBELL, p. 323, above; R. *v*. O'TOOLE, p. 325, above.

Trial—*Direction to jury on charge of grievous bodily harm*. See R. *v*. O'TOOLE, p. 325, above.

Acts and Orders [*]

Agriculture

AGRICULTURE (POISONOUS SUBSTANCES) (ARSENICAL COMPOUNDS) ORDER, 1957 (S.I. No. 320): operative March 5, 1957. Arsenical compounds are added to the poisonous substances to which the Agriculture (Poisonous Substances) Act, 1952, applies.

For penalties for contraventions, see section 4 of the Act.

Importation of hay and straw: see p. 330, below.
Milk: see p. 332, below.
Potatoes: see p. 335, below.

Animals

FOUL BROOD DISEASE OF BEES ORDER, 1957 (S.I. No. 250): operative April 1, 1957. The Order of 1952 (S.I. No. 138), is re-enacted with amendments. Bees, combs and bee-keeping equipment may be examined by an officer appointed by the Minister of Agriculture, Fisheries and Food, and sample combs taken and tested for disease. Where the presence of disease is suspected a notice may be served prohibiting the removal of bees, combs, honey and equipment, and if the presence of the disease is confirmed destruction and treatment may be required.

The principal amendments (a) enable the Minister to perform certain formal functions in place of a county agricultural executive committee, (b) prohibit the obstruction of an appointed official in the exercise of his functions, and (c) enable steps to be taken immediately after failure to comply with a notice requiring destruction or treatment, and not only after conviction for such failure.

For penalties for contraventions, see section 11 of the Agriculture (Miscellaneous Provisions) Act, 1941.

IMPORTATION OF HORSES, ASSES AND MULES ORDER, 1957 (S.I. No. 467): operative May 1, 1957. The Order of 1938 (S.R. & O., No. 272) is revoked and re-enacted with amendments. The principal of these are that racehorses, polo ponies, performing and show horses, and horses intended to be exported within fourteen days of landing, will not be required to have undergone the mallein test, but must be accompanied by a certificate from the exporting country certifying that that country was for the preceding six months free from glanders, and the owner or person in charge of the horse must also make a declaration giving certain specified particulars about the horse. The period during which an imported horse may be required to be tested with mallein is extended to twenty-eight days; and any horse brought to Great Britain without the prescribed documents may be required to be detained and isolated and subjected to examinations and tests.

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[*] Prepared by F. Maurice Drake, Barrister-at-Law.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

Prohibition of Landing of Animals, Carcases and Animal Products, and Hay and Straw from the Channel Islands Order, 1957 (S.I. No. 487): operative March 26, 1957. The landing in Great Britain of animals, carcases, animal products, hay and straw brought from the Channel Islands (other than Jersey) is prohibited.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

Poison: see p. 336, below.

Approved Schools

Contributions by education authorities: see p. 331, below.

Birds

Wild Birds (Bramblings and Black-Tailed Godwits) Order, 1957 (S.I. No. 318); Scotland (S.I. No. 326): both operative March 1, 1957. Under the Protection of Birds Act, 1954 (see [1954] Crim.L.R. 638) the brambling and black-tailed godwit are protected under special penalties during the close season but may be killed or taken outside the close season. This Order provides for their protection throughout the year, although the special penalties will remain applicable only during the close season.

For penalties for contraventions, see section 12 (2) of the Act.

Wild Birds (Sundays) Order, 1957 (S.I. No. 429): operative April 1, 1957. It is made an offence to kill or take or attempt to kill or take any of the specified birds on Sundays in Cornwall, Glamorgan and Somerset.

For penalties for contraventions, see section 12 (2) of the Act.

British Commonwealth

West African Court of Appeal (Amendment) Order in Council, 1957 (S.I. No. 279): operative March 6, 1957. The West

African Court of Appeal ceased to be an Appeal Court for Ghana (formerly the Gold Coast) on March 6, 1957, when that territory obtained independence within the Commonwealth.

Merchant shipping: see p. 335, below.

Children and Young Persons

APPROVED SCHOOLS (CONTRIBUTIONS BY EDUCATION AUTHORITIES) (SCOTLAND) REGULATIONS, 1957 (S.I. No. 420): operative April 1, 1957. The weekly contribution payable to the managers of an approved school by the education authority named in an approved school order is raised from 75s. 6d. to 82s. 6d.

Employment: see p. 335, below.

Civil Aviation

AIR NAVIGATION (FIFTH AMENDMENT) ORDER, 1957 (S.I. No. 278): fully operative May 1, 1957. The Order of 1954 (S.I. No. 829; [1954] Crim.L.R. 640) is further amended by the inclusion of new provisions for preventing excessive fatigue on the part of the operating crew (*i.e.*, pilots, flight engineers, flight navigators and flight radio operators) of aircraft registered in the United Kingdom.

The Rules of the Air and Air Traffic Control (Schedule II to the Order of 1954) as amended by the Fourth Amendment Order of 1956 ([1956] Crim.L.R. 845) are further altered so as to permit a glider, when hill-soaring, to fly closer than 500 feet to any person, vessel, vehicle or structure.

For penalties for contraventions, see Article 67 of the Order of 1954.

Defence Regulations

MOTOR FUEL ORDER, 1957 (S.I. No. 369): operative March 11, 1957. The period of validity of certain current petrol ration coupons is extended from April 17 to April 30, and the Motor Fuel (No. 2) Order, 1956 (S.I. No. 1840: see [1957] Crim.L.R. 64) is amended accordingly. The period of validity of new coupons is prescribed. Provision is also made so that a person acquiring motor fuel in respect of a particular motor vehicle may now use it in any motor vehicle of the same class or description registered in his name.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

Emergency Laws

STRATEGIC GOODS (CONTROL) (AMENDMENT NO. 3) ORDER, 1957 (S.I. No. 245): operative March 4, 1957. The principal Order of 1954 (S.I. No. 1622: [1955] Crim.L.R. 123) is amended, and now applies in respect of the following goods:—Specified internal grinding machines and high speed spindles, specified apparatus used for making telecommunications cables, specified crystals of lithium floride or of calcium fluoride, X-ray tubes, flash discharge type, specified boron element (metal) and alloys, boron minerals, specified boron compounds and mixtures and polymethyl alpha-chloroacrylate in a specified form.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

Food and Drugs

PUBLIC ANALYSTS REGULATIONS, 1957 (S.I. No. 273): operative May 27, 1957. The Regulations of 1939 (S.R. & O. No. 840) are substantially re-enacted as respects the qualifications to be possessed by persons appointed to be public analysts; and a revised form of certificate is prescribed, to be given in pursuance of section 92 of the Food and Drugs Act, 1955 ([1956] Crim.L.R. 63).

MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) ORDER, 1957 (S.I. No. 391): operative April 1, 1957. In the areas specified in the schedule to the Order special designations must be used for the purpose of all sales of milk by retail for human consumption other than catering sales.

For penalties for contraventions, see section 106 of the Food and Drugs Act, 1955.

WELFARE FOODS AMENDMENT ORDER, 1957, GREAT BRITAIN (S.I. No. 411); NORTHERN IRELAND (S.I. No. 415): both operative March 21, 1957. The prices charged for milk and National Dried Milk (other than free supplies) will be increased in respect of supplies against tokens bearing a date April 6, 1957, or later. The price of ordinary or pasteurised milk is increased to a sum not exceeding fourpence per pint (with corresponding increases in the prices of milk of other descriptions) and that of National Dried Milk to 2s. 4d. per tin.

There are also minor amendments in the principal Order relating to Northern Ireland.

For penalties for contraventions see regulation 92 of the Defence (General) Regulations, 1939.

Hire-Purchase

HIRE-PURCHASE AND CREDIT SALE AGREEMENTS (CONTROL) ORDER, 1957 (S.I. No. 430); CONTROL OF HIRING ORDER, 1957 (S.I. No. 431); both operative April 4, 1957. The Orders of 1956 (S.I. Nos. 179, 180; see [1956] Crim.L.R. 279), as amended from time to time, are superseded in respect of agreements entered into after April 3, 1957. The principal changes are (1) the requirements contained in the Order will not be complied with if, in order to pay the whole or part of the deposit or advance rentals required in respect of that agreement, money has been acquired under an agreement or arrangement of the kind mentioned in Part II of the Second Schedule. It is, however, a defence for a person charged with disposing of goods in contravention of these Orders to show both that he was unaware that money had been so acquired under such an agreement or arrangement and that he was not himself a party to it. (2) A deposit is now required if a person is in possession of goods for 14 days or more in anticipation of the making of a hire-purchase or credit sale agreement in respect of goods to which the Order applies, and (3) the Control of Hiring Order does not apply to the disposal and possession of goods which were manufactured not less than three years before the date of the agreement and which the owner has let on hire for not less than twelve months during the three years before that date. There are other minor amendments.

For penalties for contraventions see regulation 92 of the Defence (General) Regulations, 1939.

Homicide

HOMICIDE ACT, 1957 (5 & 6 Eliz. 2, c. 11): operative March 21, 1957. The law relating to homicide is amended and capital punishment abolished save in certain cases. The Act is reviewed in an article by Mr. D. W. Elliott at p. 282, above.

London

The following Orders have been made detailing prescribed routes: S.I. Nos. 311, 361, 478 (Croydon); 312 (Finsbury); 313 (Holborn); 314 (St. Marylebone); 315, 363 (Stepney); 316, 343, 405 (Westminster); 341, 360 (Shoreditch); 342 (Twickenham); 344 (Woolwich); 360 (Bethnal Green and Shoreditch); 362 (Slough); 402 (Merton and Morden); 403 (Southgate); 404 (Tottenham); 437 (Hammersmith); 478 (Croydon and Coulsdon and Purley).

The following Order has been made respecting unilateral waiting: S.I. No. 345 (Harrow).

WITNESSES' ALLOWANCES (LONDON) REGULATIONS, 1957 (S.I. No. 440): operative April 1, 1957. Regulations (S.R. & O. 1908, No. 1235) made by the Secretary of State under section 5 of the Costs in Criminal Cases Act, 1908, are revoked. The effect is that the position in the metropolitan magistrates' courts with regard to the payment of witnesses' allowances will now be the same as in other magistrates' courts.

Magistrates' Courts

Witnesses' allowances: see p. 334, above.

Medicine

NURSES ACT, 1957 (5 & 6 Eliz. 2, c. 15): operative April 21, 1957. This Act consolidates provisions previously contained in the Nurses Registration Act, 1919, and the Nurses Acts, 1943 and 1949. A person who falsely assumes the title of registered nurse or enrolled nurse or, with intent to deceive, makes use of any registration certificate issued to him or to any other person is guilty of an offence; and it is a similar offence falsely to support that some other person is registered or enrolled when this is known to be untrue (s. 27).

By section 28 it is made an offence to use the title of nurse or assistant nurse unless the person is duly registered or enrolled in accordance with the provisions of the Act. Exceptions are made in the case of certain children's nurses. Proceedings under this section may not be instituted without consent of the Minister of Health.

Any person who wilfully makes, or causes to be made, any falsification in the register, roll or list of nurses prescribed under the Act, is guilty of a misdemeanour (s. 29).

For penalties for contravention, see sections 27–29 of the Act.

NURSES AGENCIES ACT, 1957 (5 & 6 Eliz. 2, c. 16): operative April 21, 1957. This Act consolidates provisions previously contained in the Nurses Acts, 1943 and 1945. Rules of conduct are laid down for agencies supplying nurses, and such agencies may only be carried on under licence from the appropriate local authority, usually the county council (ss. 1, 2).

For penalties for contraventions, see section 4 of the Act.

Merchant Shipping

OIL IN NAVIGABLE WATERS (TRANSFER RECORDS) REGULATIONS, 1957 (S.I. No. 358): operative April 1, 1957. The master of every vessel, whether registered or not, and of whatever nationality, which is capable of carrying in bulk, whether for cargo or for bunker purposes, more than twenty-five tons of oil, or which is constructed or fitted to carry in bulk more than five tons of oil in any one space or container, is required to keep records of transfers of oil to and from the vessel while it is within the territorial waters of the United Kingdom.

For penalties for contraventions, see sections 5 to 7 of the Oil in Navigable Waters Act, 1955 ([1955] Crim.L.R. 447).

OIL IN NAVIGABLE WATERS (RECORDS) REGULATIONS, 1957 (S.I. No. 357): operative April 1, 1957. The master of every British ship registered in the United Kingdom (not being a tanker) of 80 tons gross tonnage or over and the master of every British ship being a tanker registered in the United Kingdom is required to keep records of various matters relating to oil, which are specified in section 7 (1) of the Oil in Navigable Waters Act, 1955 ([1955] Crim.L.R. 447).

For penalties for contraventions, see sections 5–7 of the Act of 1955 ([1955] Crim.L.R. 447).

MERCHANT SHIPPING ACT, 1948 (BARBADOS) ORDER, 1957 (S.I. No. 424): operative April 1, 1957. Certain provisions of the 1948 Act, relating to certification of able seamen, are extended, with modifications, to Barbados.

Mines and Quarries

CHINA CLAY AND CHINA STONE QUARRIES (EMPLOYMENT OF YOUNG PERSONS) ORDER, 1957 (S.I. No. 410): operative March 21, 1957. Every owner of a china clay or china stone quarry is authorised to give a direction, by notice posted at the quarry, the effect of which is to permit the daily period of work of every male employed, who has attained the age of 16 but is under the age of 18, to begin not earlier than five o'clock instead of not earlier than six o'clock in the morning as required by the Mines and Quarries Act, 1954 ([1955] Crim.L.R. 126).

Northern Ireland

Milk: see p. 332, above.

Pest Control

IMPORTATION OF NEW POTATOES AND RAW VEGETABLES (ENGLAND AND WALES) ORDER, 1957 (S.I. No. 298): operative March 1,

1957. The restrictions imposed by the Importation of Plants Order, 1955 (S.I. No. 81; see [1955] Crim.L.R. 196) are modified for specified periods of 1957 in respect of new potatoes from France, Portugal and Spain, and certain raw vegetables from specified districts of Belgium, France and the Netherlands.

For penalties for contraventions, see article 14 of the Importation of Plants Order, 1955.

POTATOES (CORKY SCAB) (REVOCATION) (ENGLAND AND WALES) ORDER, 1957 (S.I. No. 308): operative March 5, 1957. The Potatoes (Corky Scab) Order of 1914 (S.R. & O. No. 1034), which required notification of this disease, and the Potatoes (Corky Scab) Suspension Order of 1918 (S.R. & O. No. 390) which suspended the operation of the earlier Order, are revoked.

IMPORTATION OF RAW VEGETABLES (SCOTLAND) ORDER, 1957 (S.I. No. 436); operative April 1, 1957. During specified periods of the year 1957 the restrictions imposed by the Importation of Plants (Scotland) Order, 1955 (S.I. No. 405; see [1955] Crim.L.R. 327) are modified in respect of certain raw vegetables from specified districts of Belgium, France and the Netherlands.

Poisons

POISONS RULES, 1957 (S.I. No. 468); operative April 1, 1957. Certain changes are made in the officers who, in England and Wales, may authorise the sale of strychnine for the purpose of killing moles, and Rule 16 of the Poisons Rules, 1952 (S.I. No. 2086) is modified accordingly.

Agriculture: see p. 329, above.

Police

POLICE (SCOTLAND) AMENDMENT REGULATIONS, 1957 (S.I. No. 336): operative March 11, 1957. The principal Regulations (S.I. 1956, No. 1999; [1957] Crim.L.R. 130) are amended by providing that a serving police officer who is 45 years old or more shall be eligible for appointment as chief constable, whether of his own or another force. The principal Regulations were defective in that they made no provision for a serving officer over that age to be appointed as chief constable of his own force.

Probation

PROBATION (ALLOWANCES) RULES, 1957 (S.I. No. 272): operative February 20, 1957. Certain of the rates payable to a member of a probation or case committee travelling by his own private motor-vehicle for the purpose of performing his duties are temporarily increased while there is an increase in the rate of customs duty chargeable on petrol and hydrocarbon oils under the Hydrocarbon Oil Duties (Temporary Increase) Act, 1956.

Road Traffic

TRAFFIC SIGNS (30 M.P.H. SPEED LIMIT) REGULATIONS, 1957 (S.I. No. 274); TRAFFIC SIGNS (30 M.P.H. SPEED LIMIT) DIRECTIONS, 1957, ENGLAND AND WALES (S.I. No. 275); SCOTLAND (S.I. No. 288): all operative March 1, 1957. The Regulations made in 1941 (S.I. No. 356) are re-enacted with amendments. The main changes are that the sizes of signs for showing the 30 m.p.h. speed limit are increased and provisions are made regarding the illumination of such signs during the periods of lighting-up time, although the requirements as to illumination of these signs may be dispensed with by direction of the Minister in the case of any particular sign. The Directions are general directions for the guidance of local authorities who are under a duty to erect such signs.

MOTOR VEHICLES (CONSTRUCTION AND USE) (AMENDMENT) REGULATIONS, 1957 (S.I. No. 359); operative April 1, 1957. The 1955 Regulations (S.I. No. 482; [1955] Crim.L.R. 393, as amended by S.I. 1956, No. 540; [1956] Crim.L.R. 433) are further amended. The principal changes are: (1) as from January 1, 1958, two mirrors are required to be fitted to every passenger vehicle adapted to carry more than 7 passengers exclusive of the driver and to every goods vehicle; (2) new requirements as to the fitting of safety glass are made in respect of passenger and goods vehicles first registered on or after January 1, 1959; (3) it is no longer necessary to show a trailer plate on a trailer drawn by a motor-cycle if the cycle is a passenger vehicle, or by a dual-purpose vehicle, provided the towing vehicle is adapted to carry not more than 7 passengers exclusive of the driver; (4) lighting-up time is amended so that it is now from half-an-hour after sunset to half-an-hour before sunrise during the whole year and not merely during non-summer time as at present; (5) a new regulation is made concerning the use of television sets in motor-vehicles; (6) new rules are made in respect of vehicles fitted with flashing indicators which enable vehicles fitted with such indicators to have additional indicators visible to road users alongside, and provide that all direction indicators on either side of a vehicle and (where one is drawn) its trailer are operated by one and the same switch.

For penalties for contraventions, see rule 104 and sections 111 and 113 of the Road Traffic Act, 1930.

Motor Vehicles (Construction and Use) (Track Laying Vehicles) (Amendment) Regulations, 1957 (S.I. No. 439): operative April 1, 1957. The 1955 Regulations (S.I. No. 990; [1955] Crim.L.R. 583) are amended. The principal changes are those set out under (1) (4) and (6) of S.I. No. 359 above.

For penalties for contraventions, see reg. 77 of the 1955 Regulations and section 113 of the Road Traffic Act, 1930.

Motor Vehicles (Variation of Speed Limit) Regulations, 1956 (S.I. No. 340): operative May 1, 1957. The First Schedule to the Road Traffic Act, 1930, as substituted by the First Schedule to the Road Traffic Act, 1934, and subsequently varied by various regulations which are all now revoked, is further varied by the prescribing of new speed limits for specified classes and description of vehicles. The principal changes are (1) the speed limit of heavy motor-cars, being goods vehicles not drawing trailers and of articulated vehicles, where each wheel is fitted with a pneumatic tyre, is increased from 20 to 30 m.p.h.; (2) the speed limit of certain passenger vehicles drawing close-coupled four-wheeled trailers is increased from 20 to 30 m.p.h.; (3) the speed limit of all goods vehicles drawing a separate trailer and of motor tractors drawing a single trailer where any wheel has a soft or elastic tyre is increased from 12 to 20 m.p.h.; (4) increases are prescribed in the speed limits for heavy locomotives not drawing more than two trailers, and for certain track-laying vehicles.

For penalties for offences, see section 10 of the Road Traffic Act, 1930.

Motor Cycles (Protective Helmets) Regulations, 1957 (S.I. No. 406): operative April 1, 1957. The types of helmet which may be sold or hired to motor-cyclists as helmets recommended as affording protection in the event of an accident are prescribed. The helmets must comply with a new British Standard Specification.

For penalties for contraventions, see section 42 of the Road Traffic Act, 1956.

Salmon and Freshwater Fisheries

Lancashire River Board (Fisheries) Order, 1957 (S.I. No. 368): operative March 5, 1957. Section 61 of the Salmon and Freshwater Fisheries Act, 1923, is modified, so that in the River Lune estuary area of the Lancashire River Board, only the person to whom a licence for a heave net has been granted may use it.

For penalties for contraventions, see section 74 of the Act of 1923.

Scotland

Pest control: see p. 336, above.
Police: see p. 336, above.

Sea and Seashore

Oil in navigable waters: see pp. 334–335, above.

Wireless Telegraphy

WIRELESS TELEGRAPHY (CONTROL OF INTERFERENCE) AMENDMENT (NO. 1) REGULATIONS, 1957, IGNITION APPARATUS (S.I. No. 347); ELECTRIC MOTORS (S.I. No. 348); REFRIGERATORS (S.I. No. 349): all operative May 1, 1957. The application of the principal Regulations (S.I. 1952, No. 2023; 1955, Nos. 291 and 292; [1955] Crim.L.R. 260) is extended to the Channel Islands and the Isle of Man.

For penalties for contraventions, see section 14 of the Wireless Telegraphy Act, 1949.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

30. *Music on licensed premises*

In our petty sessional division it is felt by licensees that any application for a music licence in respect of a public-house will be refused. I have been approached by one licensee, who asked if there was any way in which he could provide music without a licence and still be legal. The following queries were referred to:

(1) Is he allowed to place a piano in the bar for any customer to play? There will be no paid pianist or entertainers.

(2) If he plays tape recordings of music in the bar, does he need a music licence?

I agree with his view that a piano can be placed in the bar, provided there is no paid pianist or entertainer, but he is anxious to know whether the police or justices can order the ultimate removal of the piano in a sort of round-about-way, as there appears to be in this area an " under-current " objection to singing in public-houses.

Have you any views on this point? [D. G. T.]

ANSWER

In districts where the Public Health Acts Amendment Act, 1890, has been adopted, section 51 of that Act makes it an offence for a person to keep or use premises (whether or not licensed for the sale and consumption of intoxicating liquor) for public music, unless a licence has been obtained from the licensing justices for the licensing district in which the premises are situated. In other areas there may be similar legislation (*e.g.*, Home Counties (Music and Dancing) Licensing Act, 1926) ; sometimes a local Act gives a right of appeal (*e.g.*, Manchester Corporation Act, 1892).

Whether or not any particular activity amounts to public music is a question of fact for the court. There must, of course, be something " public " about the music ; but there must also be something habitual about the use of the premises for music before a licence becomes necessary (*Marks* v. *Benjamin* (1839) 5 M. & W. 565). Where a piano only was provided in a bar, for casual use by customers, no licence was required (*Brearley* v. *Morley* [1899] 2 Q.B. 121).

Similarly with " canned " music, whether from recordings or radio ; it is a question of fact whether or not such music would be held to be " public." The provision in a public room of a mechanical gramophone or juke box, operated by customers putting coins in, has been found to be public music (*Amusement Equipment Co., Ltd.* v. *McMillan* (1941) 85 S.J. 333). But where a licensee provided a radio set, operated by his servant, for the amusement and entertainment of himself and his household, but audible also to customers in the bars, it was held not to amount to public music (*Badger* v. *James* (1934) 78 S.J. 768).

As to the removal from the bar of a piano provided for casual use by customers, and so probably not amounting to public music, in the absence of any public music licence to which a " no piano " condition could be attached, or of any such condition to the liquor licence, it is difficult to see how the police, or the justices, could get an innocent piano removed. Incidentally, prosecutions under section 51 of the Act of 1890 cannot be undertaken by police in any case, but only by the local authority (*Oberst* v. *Coombs* [1955] Crim.L.R. 255). [N. W.]

31. *Right to demand parking fee*

Within the jurisdiction of our urban district there is a short stretch of promenade which is maintained by the council. For parking vehicles on the promenade, drivers are charged a nominal fee and I therefore conclude that the carriageway forming part of the promenade is private property, although there is a lane leading to a major road at each end.

Extending for 1½ miles from one end of the promenade is a belt of rough land, consisting mainly of grass, sand and pebbles. On the seaward side, this land is bordered by a bank of pebbles which drops steeply to the beach, and which also serves as the end of high water. On the other side it is bordered for a long distance by a field accommodating a large caravan camp. Further on there is a cottage with a poorly fenced garden, and for the remainder of the way a railway line forms the border.

A large number of people make use of this land during the summer months, arriving with cars, tents and all manner of holiday equipment. The council employ an inspector, for hiring deckchairs and collecting the parking fee in respect of each vehicle that stops on the promenade. Some objection has arisen when the inspector travels along the 1½ mile length of rough land, demanding a parking fee in respect of vehicles on there as well. The promenade roadway is the only vehicular access to this rough land.

The following arguments and differences are continually arising:—

(1) The area of beach between high and low water mark is Crown land and therefore free for anyone to use. The rough land in question belongs to the owner of the property immediately abutting it. For instance, the area of rough land adjoining the caravan camp, is the property of the camp proprietors. The same applying to the cottage and railway line.

(2) The rough land belongs to the urban district council.

(3) The rough land forms part of the beach and therefore is Crown property.

(4) The inspector is exceeding his duty in collecting the parking fee from drivers who are not on the council maintained part of the promenade.

(5) The inspector is entitled to collect the parking fee in respect of the vehicles parked on rough land, as a toll for using the promenade roadway to get there.

Can you tell me, which, if any, of the five foregoing versions is the correct one. Also if you have any legal opinion on the situation. I should like to point out that the land in question is also the only access to the caravan camp. I believe that deeds are in existence defining the area of land in front of the cottage mentioned, as far as high water, to be part of the cottage garden. Arising out of the same argument I have heard that fishermen have a legal right to approach a beach through anyone's land, if there is no roadway or path. Is this correct? [D. G. T.]

ANSWER

This rough land, being above high water mark, cannot be regarded as foreshore, and it would normally be presumed to belong to the owner of property abutting on it. The facts, including the title deeds, may well prove this not to be the case, and if the land has no other owner, it must presumably vest in the Crown. There is no case that I can see for the land to belong to the U. D. C., nor can any parking fees be exacted in respect of cars parked anywhere other than on land belonging to the council. Fishermen have no right at common law to get across private property to the beach, or over the foreshore itself, but such rights may be established by immemorial custom, and have in fact been established in some cases: see, *e.g.*, the famous case of *Mercer* v. *Denne* [1905] 2 Ch. 538. [J. F. G.]

Letters to the Editor

Corroboration of Evidence of Victims of Sexual Assault

Sir,

With reference to *R.* v. *Finnigan* reported at [1957] Crim.L.R. 246, I respectfully dissent from the view implicit in the last sentence of the commentary, that the rule appropriate to the evidence of two accomplices is applicable to the evidence of two victims of a sexual offence.

In the absence of evidence of consent it would appear that a person who is a victim of a sexual offence is not *ipso facto* an accomplice of the offender. The rationale of the rule as to accomplices is surely based on the possibility that a witness who is an accomplice may be influenced by self-interest; the rationale of the rule as to complainants in sexual cases is based on the difficulty of disproof and the possibility of an inventive imagination on the part of a single complainant; the rationale of the rule as to children is based partly on the possibility of an inventive imagination and partly on the general unreliability of an undeveloped mind.

It is submitted that it would have been proper for the chairman to direct that the rule as to the evidence of a single complainant in a sexual offence has no necessary application to a case where there are two complainants, even though it is a constituent element of the offence that the exposure must be to more than one person, since the rationale of the rule as to the evidence of a single complainant in sexual cases is as indicated above, and such considerations do not apply where there are two complainants, each subject to cross-examination as to the consistency of the complaint. Perhaps the appropriate approach can be seen if an offence can be supposed which cannot be committed except to six or more persons.

It would seem difficult to suggest that the evidence of those six does not suffice in proof of the offence.

There are three classes of case where either corroboration must be given or where the jury should be warned of the danger of convicting on uncorroborated evidence.

It is perhaps important that the judge should indicate the twofold need of corroboration if, for example, a complainant in a sexual case is also a child.

A combination of such factors, however, does not raise a " rule of practice " into a " rule of law " so that the jury must be directed that corroboration is essential.

Yours faithfully,
Peter G. Smith,
Barrister-at-Law.

Liverpool.

[Mr. J. C. Smith writes:

" I entirely agree that the rule as to the evidence of two accomplices does not *necessarily* apply to the evidence of two victims of a sexual offence and that it might be possible to distinguish between the two cases on the grounds of a differing rationale. But if the rationale as to complainants is, as Mr. Smith suggests, the difficulty of disproof and the possibility of an inventive imagination on the part of a single complainant, it is not, with respect, clear to me that this affords a valid ground for the distinction. Where there are two or more complainants the difficulty of disproof is certainly no less than in the case of one and the dangers of inventive imaginations, though perhaps diminished, still exist. This is particularly so where the complainants are also children who are notoriously suggestible and sometimes given to living in a world of make-believe.

Admittedly the evidence of six victims of the same offence would seem to be convincing proof; but the evidence of six accomplices is not negligible and yet the jury would be told that they do not corroborate one another.

It is, of course, clear that, even where the complainant is also a child, the rule of practice does not become a rule of law and that the jury must be warned only of the *danger* of convicting in the absence of corroboration."]

Books and Periodicals

Reviews:

A History of English Criminal Law and its Administration. By Leon Radzinowicz, LL.D., Fellow of Trinity College and Director of the Department of Criminal Science, University of Cambridge. Vol. 2:

The clash between private initiative and public interest in the enforcement of the law. Vol. 3: Cross-currents in the movement for the reform of the police. London: Stevens & Sons, Ltd. 1956. Vol. 2: xvii and 427 and (appendices, bibliography, tables and index) 325 pp. Vol. 3: xvii and 474 and (appendices, bibliography, tables and index) 215 pp. (£4 4s. net, each volume.)

At the beginning of the last century, the simple English recipe for the control of lawlessness was a bloodthirsty criminal code and a system of rewards for informers. Volume 1 of Dr. Radzinowicz's work dealt with the growth of the movement to reform the first; the two now under review chronicle the efforts to replace the common informer and slothful constabulary by an organised police. Together they make plain the scope of the task that the author has set himself. Stephen wrote a history of the English criminal law from Anglo-Saxon times in three volumes. Dr. Radzinowicz is content to cover two centuries. But he combs not only the statutes and law reports, not only the blue books and parliamentary debates, but what can only be described as the mountain of manuscript material in the British Museum, Departments of State, and various other libraries. Not content with this, he has made meticulous search of contemporary periodicals and political tracts, modern historical publications, and legal writings throughout his period. This vast detail, though it appears plainly enough in the footnotes and appendices, is so well assimilated that the reader is carried along on the even flow of the text.

It is risky to say of a work of scholarship that it is definitive, for every inquiry is a challenge to others to better it. Yet one cannot imagine that this will ever be displaced within its field. One illustration may serve. At the same time as these two volumes were published, there were printed for the first time the important memoirs of Henry Goddard (1800–1883), who was a runner in the Bow Street force. Had Dr. Radzinowicz's work been prepared less carefully, this might well have rendered a few of his pages out of date. But in fact he made full use of Goddard's memoirs from the unpublished manuscript, so that his text is in no way affected by this new addition to published police history.

The leisurely pace of the work is shown by the fact that, although both these volumes deal with the history of the efforts to establish an organised police, they take the main story only up to the first quarter of the nineteenth century, before Peel's police had been introduced. (In this respect the lettering on the spine of Volume 3 is somewhat misleading.)

Although the presentation is strictly historical in character, and attempts to point no moral for the law of our time, no one who is acquainted with the legislation presently in force can fail to derive fresh understanding from it. For example, every criminal lawyer must have noticed, though he is unlikely to have had to deal with, a statute among the consolidating legislation of 1861 known as the Old Metal Dealers Act. It is an enlightened measure for dealing with the problem of theft by regulating one of the trades that might be used for the disposal of stolen goods. This strategy of indirect approach is not particularly evident in other legislation of the period, but we can gather from Dr. Radzinowicz's account that it owed its origin to a suggestion made by Colquhoun in 1793; and the author does much to rescue this able and energetic reformer from the oblivion into which Peel ungenerously tried to thrust him.

Other instances of social prophylaxis were the statutes aimed against mendicancy, and those for restricting the pleasures of the masses, which were thought to be causative of crime; and it is impossible to understand such measures as the Vagrancy Acts, the licensing laws and the statutes for the licensing of entertainments (all of which are represented in the present law), without knowing something of the social background and social theories which called them into being. Again, only legal history can explain the mysterious crime of fortune-telling, or the peculiar liability of the police fund for damage caused by rioters, or the dictatorial powers of arrest and punishment of " suspected persons."

But it is principally as a history of social thought upon the epic scale that Dr. Radzinowicz's volumes will be studied and remembered. England in Bentham's day, and for many a year afterwards, was a compound of problems that cannot now be pictured without a strong effort of the imagination. These evils, and the measures eventually taken against them, are in outline fairly well known—though Dr. Radzinowicz manages to fill in many details, as in his striking account, based on manuscript sources, of the infamous " flash houses," which makes our present youth problem seem to fade into insignificance. What is quite new in his work is the meticulous study of the long and painful efforts that eventually led to reform. It is a horrifying story of official inertia and misdirection in the face of crying evils. But it is also an absorbing story of how the schemes of the visionaries and the doubts of the pessimistic fused to give us our criminal law. Almost one might say that the period chronicled by the author was the age of official endeavour to avoid creating a police force; an age when those in authority bent themselves to adopt every solution for the ills of society save the one which experience has since shown to be right. In the end, it was the politicians that took the credit for creating the police force, after the pressure of events had made this inescapable.

Glanville Williams.

Sudden Death. By David Haler, M.B., D.C.P., Consultant Pathologist to Plaistow Hospital. London: E. G. Berryman & Sons, Ltd. 1955. ix and 82 and (bibliography and index) 8 pp. (12s. 6d. net.)

The author acknowledges that the general idea of this little book is based on " Notes for the Guidance of Coroner's Officers " and your reviewer finds that its arrangement and contents are very similar to a tract of the same size and published by the same firm in 1897, entitled " Duties of Coroners' Officers."

It is a common and deplorable practice to appoint as coroner's officer any police officer who can be spared from other duties, or alternatively to arrange that the first police officer arriving at the scene of death shall automatically become coroner's officer for that particular case. In fact the duties of coroner's officer demand a high degree of technical knowledge and acumen, a point which was recognised by the Departmental Committee on Coroners of 1936 (Cmd. 5070, para. 22). This little book, which conveniently fits in the pocket, will be a great help to any police officer who finds himself unexpectedly carrying out duties as coroner's officer. At the same time it is a pity that after more than half a century of progress in medico-legal investigation, the author could do no better than to reproduce almost word for word the sections in the 1897 edition dealing with the activities of the officer at the scene of death, perhaps the most important of his duties.

But, as might be expected, the present work is intended to attract a much wider interest than its predecessors, and is addressed to undertakers, local registrars, doctors, and others likely to be concerned with sudden death. As such it has considerable shortcomings. Opening, as did the 1897 edition, with a list of "cases to be reported" (to the coroner), the author fails to recognise the obscurity of the coroner's jurisdiction inherent in the term "unnatural death" (Coroners Act, 1887, s. 3 (i)), though later he adverts to the absence of a general enforceable duty to notify the coroner of such deaths. A number of mistakes appear, which detract from the value of the book, particularly in the sections dealing with death certification. The registrar does not have to report cases in which it appears that the attending certifying practitioner has not attended the deceased within fourteen days of death—unless it also appears that the practitioner has not seen the body after death. Similarly he does not have to report cases where it appears that the body has not been seen after death—unless it also appears that the deceased has not been attended within fourteen days before death (Registration (Births, etc.) Consolidated Regulations, 1954, reg. 82 (i) (*c*)). The term "attendance" is not "taken to mean attendance within eight days of death" (p. 18), this being merely a recommendation of the Select Committee on Death Certification ((1893) Rec. 63). Sections of the Births and Deaths Registration Act, 1874, should not be referred to where they have been repealed by the Act of 1953 (p. 13). Such mistakes are probably due to the use of textbooks of forensic medicine by the author in which such errors are commonplace, and symptomatic of the current treatment of the subject as a specialised branch of pathology. Less important errors include the implication that the coroner must always view the body before an inquest (pp. 32, 50) which overlooks the Coroners (Amendment) Act, 1926, s. 18 ([1954] Crim.L.R. 782–784). The passages dealing with the procedure where criminal charges are pending in other courts are not clear, and rule 13 of the Indictable Offences (Coroners) Rules, 1927, is confused with the Coroners Rules, 1953 (p. 44). Certain statements require qualification, *e.g.*, "the coroner's court is not a criminal court" (p. 11), and that in cases of death from procured abortion "the correct verdict is murder, perhaps manslaughter" (p. 39). Sufficient care has not been taken to bring up to date the list of technical terms which also appeared in the 1897 edition. Coronary disease, which has subsequently been recognised as a very common cause of sudden death, is conspicuously absent, while Burnett's disinfecting fluid, which is out of use and has not been marketed for years, is retained. Many of the mental conditions associated with suicide (a major aspect of the coroner's work) are absent, as is the term "psychotic" under which they are usually collected, whereas the term "neurotic" which rarely denotes tendency to suicide is included and defined, as in the 1897 edition, as "applied to disease of nervous origin." As might be expected from the pen of a consultant pathologist the sections concerning the indications for medico-legal autopsy are of a high standard.

J. D. J. HAVARD.

Police Headquarters. By Quentin Reynolds. London: Cassell & Co., Ltd. 1956. 339 pp. (18s. net.)

Mr. Reynolds is well known in this country for his war-time broadcasts, and in this book he tells the story of the New York Police Force, regarded in the United States as the finest in the country. His method of telling this story is to take one police officer, by name Frank Phillips, and to follow his career from the time when he joined the Force as a rookie, until the present day when Inspector Phillips is in charge of the Detective Bureau. In the course of this career Phillips was concerned in investigating a number of famous crimes and tracking down and arresting many criminals whose names are known not only in the United States but also in this country. The book is not sensational; it is well written and provides a revealing picture of the methods of the New York police. It will interest not only police officers but the general reader.

M. W. M.

Aspects of Murder. By T. C. H. Jacobs. London: Stanley Paul & Co. Ltd. 1956. 219 pp. (16s. net.)

This book contains accounts of some twenty murders of the last fifty years, few of which contain much interest from the detection of crime viewpoint.

One or two trials described excited great public interest at the time, and these would have provided more interest for the reader had the author devoted more space to them and less to some of the more sordid aspects of murder.

The author, in his consideration of murder by juvenile delinquents, is vaguely disapproving of modern psychology, but apart from this there seems to be no *raison d'être* for this book.

A. L. N.

The Business of Crime. By Robert Rice. London: Victor Gollancz, Ltd. 1956. 248 pp. (16s. net.)

Here is a book, unlike many others recently published in this field, which does not deal with the usual nauseating sensational murders the subject of so much and frequent consideration. The author, a writer with a lively style, is on the staff of the *New Yorker.* He tells, here, the story of five " big business " crimes. They deal with an outbreak of arson in Brooklyn; the manufacture and distribution of narcotics; the smuggling of illegal immigrants from Havana into America; the counterfeiting of American Express cheques in France and the jeweller whose losses at betting drove him to bribing college basket ball players.

From the point of view of the English lawyer it is interesting to note how long it takes for the American courts to go into action and produce results; for example, one man was arrested on April 5, 1948, indicted before a Federal Grand Jury on October 22, arraigned and pleaded guilty on January 2, 1949 and eventually sentenced on August 12, 1949.

P. A.

The Reluctant Hangman. The story of James Berry, executioner 1884–1892. By Justin Atholl. London: John Long, Ltd. 1956. 185 and (index) 3 pp. (16s. net.)

James Berry was a hangman from 1884 to 1892 and this book is an account of that period of his life. It was during this time that the long drop was introduced and Berry continued the work of his predecessor, Marwood, who started converting hanging into a science. Berry, when he took up hanging, was an impoverished shoe salesman and one of the reasons for becoming hangman was the increase in income which he would thereby obtain. He was only hangman for seven years and after that he carried on a campaign for the abolition of capital punishment. The author has traced Berry's change in attitude over this period. With the author, one may well doubt whether Berry could really have been " opposed to capital punishment in principle " throughout the time during which he hanged over 130 men and women. Although this is hardly a book for bedside reading it is undoubtedly of interest.

P. A.

Books Received:

Police Law. An arrangement of law and regulations for the use of police officers. Fourteenth edition. By Cecil C. H. Moriarty, C.B.E., LL.D. London: Butterworth & Co. (Publishers) Ltd. 1957. xx and 549 and (tables and index) 68 pp. (15s. net.)

Jervis on the Office and Duties of Coroners. Ninth edition. By W. B. Purchase, C.B.E., M.C., M.B., D.P.H., of the Inner Temple, Barrister-at-Law; Coroner to H.M.'s Household and for the County of London and H. W. Wollaston, of the Middle Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1957. xxiv and 554 and (index) 11 pp. (£4 4s. net.)

The Sexual Criminal. A psychoanalytical study. Second edition. By J. Paul de River, M.D., F.A.C.S. Springfield, Illinois: Charles C. Thomas. Oxford: Blackwell Scientific Publications. 1956. xx and 360 and (index) 15 pp. (50s. net.)

Famous Judges and Their Trials. A century of justice. By Leonard Gribble. London: John Long. 1957. 192 pp. (15s. net.)

Underworld U.S.A. By Joseph F. Dinneen. London: Cassell & Co., Ltd. 1957. xvi and 238 pp. (15s. net.)

Special Branch Officer. International security assignments of ex-Superintendent George Wilkinson. London: Odhams Press, Ltd. 1956. 250 and 4 pp. (16s. net.)

The English Penal System. By Winifred A. Elkin. Harmondsworth, Middlesex: Penguin Books. 1957. 277 and (bibliography and index) 9 pp. (3s. 6d. net.)

Reader's Digest:

Police: Problems raised for the police by industrial disputes and strikes: 4 *The Police College Magazine* 347.

Police: Use of electronic apparatus: 4 *The Police College Magazine* 364.

Receiving: Proof of larceny on a charge of receiving stolen goods: 101 *Solicitors' Journal* 238.

Self-defence: Examination of the scope of self-defence as a defence: 223 *Law Times* 153.

THE
CRIMINAL LAW
REVIEW

Editors
JOHN BURKE and PETER ALLSOP, M.A.
Barristers-at-Law

Editorial

Diminished responsibility

Section 2 of the Homicide Act, 1957, introduced the doctrine of diminished responsibility into English law by providing that where a person who kills another suffers from such abnormality of mind as substantially impairs his mental responsibility, he shall be guilty of manslaughter not murder.

At Leeds Assizes on April 26 this defence was pleaded by a young woman charged with the murder of a baby. It was alleged that the defendant had strangled the baby while baby-sitting because of a grievance against the mother. One doctor gave evidence that the defendant was in the lowest intelligence grade, but in his opinion there was no insanity which would come under the McNaghten rules. The jury found that the defendant was suffering from mental abnormality bringing her within the section, and she was convicted of manslaughter. Glyn-Jones J. sentenced her to life imprisonment, and expressly stated that he had in mind the proper authority's discretion under such a sentence to release the defendant when she might safely return to normal life.[1]

The doctrine of diminished responsibility has long been familiar to Scottish lawyers and because of the importance it has now assumed in English law we are publishing an article on this subject by Professor T. B. Smith, at p. 354.

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[1] See the *Daily Telegraph*, April 27, 1957.

Driving while uninsured

Where the driver of a vehicle possesses a policy of insurance, does the illegal use of the vehicle render the policy invalid and the driver liable for the offence of driving while uninsured? This question has arisen in two cases in similar circumstances: *Police* v. *Bishop* [1956] Crim.L.R. 569, heard in the Walsall Borough Magistrates' Court, and *Police* v. *Rose,* a case heard recently by the Bournemouth magistrates.[2] In both cases the defendant, who was insured in relation to his own motor-cycle and other vehicles, took and drove away another's motor-cycle without the owner's consent, and was charged with this offence and with driving while uninsured. In both cases the insurance companies gave evidence that they would regard themselves as covering the defendants on these occasions, and the charges of driving while uninsured were dismissed.

We understand that an appeal may be made against the decision of the Bournemouth magistrates.

Home Office

Sir Austin Strutt has been appointed Deputy Under-Secretary of State for the Home Department in succession to Sir Arthur Hutchinson, who has retired.

Some research concerning the penal system has been done on behalf of the Home Office by the universities. Now the Home Office is forming its own research unit, which will consist of two research workers of graduate status with ancillary staff.

Detention centre

The second senior detention centre in England and Wales was opened at Werrington in Staffordshire on April 8. The centre will provide secure accommodation for about seventy boys, aged between 17 and 20. All courts in Cheshire, Derbyshire, Shropshire and Staffordshire may send boys to the centre, and so may certain other courts in Lancashire, Warwickshire and the West Riding of Yorkshire. The warden is Mr. J. H. Waylen, M.B.E., who joined the prison service in 1947 and served at North Sea Camp and Portland Borstal institutions before becoming Deputy-Governor of Manchester Prison in 1955.

Discharged prisoners

The Advisory Council on the Treatment of Offenders has set up a subcommittee to consider whether any changes are necessary in the obligations of discharged prisoners to report their addresses for the information of the police, and whether there should be compulsory after-care for prisoners released from sentences of imprisonment.

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[2] See *The Times*, May 7, 1957.

Negligence causing hurt to persons on the highway

On February 11, 1957, one Dunsby was summoned at Clerkenwell Magistrates' Court " for that being the driver of a carriage on a highway he did by negligence cause hurt to a person passing on such highway contrary to section 78 of the Highways Act, 1835." Evidence was given that the rear door of the van which the defendant was driving was swinging to and fro and knocked down a person walking on the pavement. Counsel for the defence submitted that there was no case to answer; there had been no negligence in connection with the driving of the car, and it had been held in *Shears* v. *Matthews* [1948] 2 All E.R. 1064 that only such negligence is covered by section 78. The magistrate, Mr. Frank Powell, held he was bound by this decision and dismissed the summons.[3]

Inflicting grievous bodily harm

At Old Street Magistrates' Court a husband who so frightened his wife that she jumped out of a first-floor window to escape him and injured her foot was found guilty of inflicting grievous bodily harm contrary to section 20 of the Offences against the Person Act, 1861. The magistrate, Mr. J. F. Marnan, Q.C., gave him a conditional discharge for twelve months.[4]

A Scottish certificate

Evidence of who was driving a particular motor-vehicle on a particular day may be given by a certificate signed by a constable under section 41 of the Criminal Justice Act, 1948. This section does not apply to Scotland and the question was recently raised at Marlborough Street Magistrates' Court whether a certificate signed by a Scottish constable was admissible as evidence. The magistrate, Mr. Clyde Wilson, decided to admit the certificate on the ground of expediency but the point remains arguable and may well be raised again.[5]

Probation

It is fifty years since Lord Samuel, as Under-Secretary to the Home Office, introduced the Probation of Offenders Bill in the House of Commons. Speaking to the annual conference of the National Association of Probation Officers on May 4, Lord Samuel said that our probation system has now become the pattern for legislation in many countries. Probation must not be regarded as a kindly way of letting off a delinquent when it is difficult to know how to deal with him; there must be a reality of control and a constant stress on the personal responsibility of the individual. Probation officers must not become one more type of bureaucrat.

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[3] See 21 *Journal of Criminal Law* 97.
[4] See 21 *Journal of Criminal Law* 102.
[5] See 21 *Journal of Criminal Law* 107.

The Home Secretary also addressed the conference. He announced that the Department of Criminal Science of Cambridge University hope to publish a report soon on a survey concerning persons in London and Middlesex whose probation orders terminated in 1948, 1949 and 1950.

United States

The Federal Bureau of Investigation has reported that in 1956 major crimes in the United States totalled more than 2,500,000, an increase of 13·3 per cent. over 1955. According to the F.B.I. crime has increased annually since 1950 almost four times as fast as the population.

In New York a magistrate is trying a novel method of dealing with juvenile offenders—he makes them write essays on American history, with the intention of making them appreciate the society in which they live.

Massachusetts has also been concerned with the past. Recently the legislature passed a measure to reverse the convictions of six women executed in Salem for witchcraft in 1692. The measure was at first rejected because, at the time of the convictions, Salem was a British colony.

Prisons

The Home Office have issued a revised edition of *Prisons and Borstals,*[6] a statement of policy and practice in the administration of penal institutions in England and Wales. Such a revised edition has been made necessary, writes Mr. Butler in his foreword, by new developments in prison and Borstal services caused by the progressive implementation of new forms of treatment under the Criminal Justice Act, 1948. The booklet is comprehensive and contains much useful information for those concerned in the administration of criminal justice.

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[6] Published by Her Majesty's Stationery Office, price 5s.

Parliament

Report of Prison Commissioners

The Home Secretary is examining the problem raised by the reports made on prisoners eligible for preventive detention, corrective training or Borstal. He is particularly concerned that the courts should have the fullest possible information, and that the prisoner should not be deterred from giving this, but at the same time it is necessary to consider the interests of third parties who may be named in the reports (H.C. Debates, Vol. 568, col. 570; April 4).

Drugs

There have been no prosecutions for trafficking in cannabis (Indian hemp) during the last five years. There have been a number of prosecutions for unlawful possession of the drug, the number in 1956 being 106. The amount of cannabis seized last year was 251 lb. (Vol. 568, col. *95*; April 8).

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Diminished Responsibility

By T. B. Smith
Professor of Scots Law in the University of Aberdeen.

A by-product of the controversy regarding capital punishment has been the amendment by Part I of the Homicide Act, 1957, of the English law regarding murder.[1] The doctrine of constructive malice has been abolished; survivors of suicide pacts are to be indicted for manslaughter and not for murder; the doctrine of provocation—so far as murder is concerned—is freed from arbitrary distinctions; and killing by persons suffering from "diminished responsibility" (in circumstances which would otherwise amount to murder) is to be regarded in law as manslaughter.

The doctrine of "diminished responsibility" has been accepted by the Scottish criminal courts for some ninety years at least, and the Royal Commission on Capital Punishment had been attracted by the idea of recommending the incorporation of this doctrine into the English law of murder. They considered, however, (rightly) that it would be anomalous to restrict this defence to one crime alone—which they believed (erroneously in the view of the present writer) was the case in Scottish criminal law.[2] When the Army and Air Force Acts of 1955 were being debated at the Bill stage the suggestion was again made that recognition should be given to the defence of diminished responsibility in service law. This seemed especially desirable in view of the then archaic state of the substantive English law of murder—which by virtue of clause 70 of each Bill would apply to servicemen generally, whether they were English or not. This proposal was rejected, and Sir Patrick Spens observed,[3] "The rather unsatisfactory compromise was introduced by the learned law officers from Scotland which merely provided that certain soldiers should be sent back for trial so that they could get the benefit of this particular defence under Scottish law" (*scil.* the defence of diminished responsibility). The Government's attitude had, however changed when the Homicide Bill was presented to Parliament in 1956. The Lord Chancellor and Home Secretary explained that it was proposed to introduce into English law the Scottish law of diminished responsibility; and the Attorney-General stated[4] that "what we have done is to adopt and adapt the Scottish law of diminished responsibility in cases which do not amount to insanity." It may indeed be stressed that section 2 of the Homicide Act (which applies to England and Wales and to courts-martial) adapts as well as adopts the Scottish common law regarding diminished responsibility. The solutions North and South of the Border need not be identical. In English law the language of the section must be the main consideration. Nevertheless the statutory defence in England will probably be construed with the assistance of Scottish authority. It may, therefore, be helpful to English criminal lawyers first to outline the doctrine of diminished responsibility as it has been applied in Scotland, and secondly to note certain matters on which Scottish and English practice will or may differ in applying the defence of diminished responsibility.

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[1] See the article by Mr. D. W. Elliott at [1957] Crim.L.R. 282.
[2] See §§ 407–413 of the Report, Cmd. 8932.
[3] H.C. Debates, Vol. 561, col. 477; November 28, 1956.
[4] H.C. Debates, Vol. 560, col. 1254; November 15, 1956.

Evolution of Diminished Responsibility in Scottish Practice [5]

To begin with it may be well to note that the defence of diminished responsibility in Scottish practice is not to be regarded as a corrective to the arbitrary categories of the McNaghten Rules [6] as seems to be the case in England. The McNaghten Rules have never been part of the law of Scotland. True, they were quoted in *Gibson* (1844) 2 Broun 332 just after *McNaghten's Case*, but they have not taken root in Scotland. The Scottish criminal courts have followed the advances of reliable medical knowledge regarding insanity; have long accepted that a plea of insanity may be founded on impairment of volition by mental disease; and have declined to be bound by any sacrosanct formula.[7] The defence of insanity has been rare in modern Scottish practice, partly because a person who is certifiably insane at the time of trial is not, as a rule, in Scotland allowed to thole an assize,[8] and partly because those whose mental abnormality does not amount to certifiable insanity are dealt with as cases of diminished responsibility.

The doctrine of diminished responsibility was not recognised in the early nineteenth century by Hume or Alison, the leading writers on Scottish criminal law, but seems to have been first clearly accepted by Lord Deas in *Dingwall,* 5 Irv. 466, in 1867. Dingwall was indicted for the murder by stabbing of his wife—with whom his relations had usually been friendly. There was no proof of premeditation. Though the panel (the accused) was not certifiably insane, it was established that his mind had been weakened by successive attacks of disease, particularly of *delirium tremens* and possibly also by epilepsy and sunstroke. The presiding judge (who was sitting with Lord Neaves) considered that there was evidence of such approximation to insanity that the jury would not be violating the law if, on that account, they returned a verdict of culpable homicide (the Scottish equivalent of "manslaughter" in English law). The jury unanimously accepted this view, and the panel was sentenced to ten years' penal servitude. In a number of subsequent murder trials during the nineteenth century and early twentieth, some Scottish judges, and especially Lord Deas, referred to *Dingwall* and charged juries to the effect that proof of weakness or aberration of mind which did not amount to insanity would justify the reduction of the quality of the crime from murder to culpable homicide. A verdict to this effect was, Lord Deas said, the equivalent in Scottish practice to a verdict of murder in the second degree or murder with extenuating circumstances in other countries.[9] In several of the cases in which this direction was given there was evidence of a weakening of the mind by alcoholism. Lord McLaren also considered the doctrine of diminished responsibility to be relevant in a case of child murder.[10] "It is a perfectly legitimate topic of consideration that according to the evidence the act was done immediately after delivery, and apparently without premeditation, at a time when the woman would be experiencing acute physical suffering, when she was alone and without assistance, and had apprehensions as to the disclosure of her condition." The same judge in *Smith* (1893) 1 Adam 34 considered that the jury would be justified in giving effect to this defence if they found that the mind of the accused (who was indicted for murder) had become so unhinged by a long course of verbal persecution that he had finally reacted to a trivial insult by shooting his tormentors. The charge in *Aitken* (1902) 4 Adam 88 indicated limits to the application of the defence of diminished responsibility. The jury were warned that it was only relevant if the accused, who was charged with the murder of his wife, had suffered from some mental debility amounting to brain disease;

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[5] The present writer has dealt in some detail with the Scottish law regarding insanity and diminished responsibility in his book in the British Commonwealth Series, *United Kingdom*, Vol. 1, Part 2, pp. 716 *et seq.* pub. Stevens and Sons, London, 1955, to which general reference may be made.

[6] (1843) St.Tr.(N.S.) 847.

[7] See esp. Lord Justice-General Dunedin in *Brown* (1907) 5 Adam 312; *Miller* (1874) 3 Coup. 16; *Macklin* (1876), *ibid.*, p. 257; *Barr*, *ibid.*, p. 261; *Milne* (1863) 4 Irv. 301; *Sharp*, 1927 J.C. 66; *Mitchell*, 1951 J.C. 53 and the Minutes of Evidence given by Lord Cooper and Lord Keith before the Royal Commission on Capital Punishment, 1950, 18th Day, qq. 5189, 5201–5202, 5216, 5479.

[8] *i.e.*, to undergo trial. But see, *e.g.*, *Mitchell*, 1951 J.C. 53.

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[9] *Granger* (1878) 4 Coup. 86; *Ferguson* (1881) *ibid.*, 552; *Brown* (1882) *ibid.*, 596; *Gove, ibid.*, 598; *Brown* (1886) 1 White 93.

[10] *Abercrombie* (1896) 2 Adam 163 esp. at p. 166.

and that, apart from the ordinary effects of drink or anger or jealousy, he had so brooded over his wife's conduct that his mind had been morbidly affected.

The cases to which reference has been made so far illustrate the early application of the doctrine when the indictment was for murder. Diminished responsibility has not, however, been restricted in Scots law to the crime of murder alone, and indeed among early examples of the invocation of the doctrine are cases of fire-raising [11]; firing hayricks [12]; and theft.[13] It has often been applied in cases of culpable homicide,[14] and is also regarded as relevant in charges of assault.[15] Since, however, there is a minimum punishment fixed by law for murder, judicial discretion as to punishment (which is unrestricted where other crimes are concerned) can only operate after the reduction of the crime of murder to " culpable homicide "—that is the equivalent of " manslaughter " in English law. Thus diminished responsibility may have double effect when the indictment is for murder. If provocation is regarded as a general defence, then " diminished responsibility " should likewise be so regarded. Indeed the effects of establishing provocation and diminished responsibility are the same. Unlike " special defences," however,—such as *alibi,* insanity, or that the crime alleged against the accused was in fact committed by someone else—the defence is not bound in Scottish practice to give notice to the prosecution before trial that reliance will be placed upon a plea of " diminished responsibility." Moreover, if a plea of diminished responsibility or of provocation succeeds, this is not exculpatory, but merely operates in mitigation of sentence.

Modern Formulation of the Law

Despite a strong attack on the doctrine of diminished responsibility made by Lord Johnston in 1914,[16] it was developed after the First World War, and given added importance from discussion in the Whole Court of Justiciary.[17] Yet the judges have preferred to describe the circumstances in which diminished responsibility may be relevant, rather than venture to formulate a precise definition. Their language may be compared with the language of section 2 (1) of the Homicide Act which will regulate the scope of the defence in English law.

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[11] *Fergusson* (1894) 1 Adam 517.

[12] *Wilson* (1877) 3 Coup. 429.

[13] *Small* (1880) 4 Coup. 388; also *M'Lean* (1876) 3 Coup. 334, in which case the doctrine was accepted by a bench of judges.

[14] See *Kirkwood,* 1939 J.C. 36 for review of authorities.

[15] Macdonald, *Criminal Law,* 5th ed., 117.

[16] *Higgins* (1913) 7 Adam 229; 1914 J.C. 1.

[17] The leading post-war dicta are collected in Appendix 8 (b) to the Report of the Royal Commission on Capital Punishment, Cmd. 8932.

In *Savage*, 1923 J.C. 49, Lord Justice-Clerk Alness said (at pp. 50–51) of diminished responsibility " It is very difficult to put it in a phrase, but it has been put in this way: that there must be aberration or weakness of mind; there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility." Later, in *Muir*, 1933 J.C. 46 at 48–49, the Lord Justice-General (Lord Clyde) approved the words of the charge given at the trial, " was he, owing to his mental state, of such inferior responsibility that his act should have attributed to it the quality not of murder but of culpable homicide? " and Lord Sands, in the same case, referred to " partial insanity, which is that weakness or great peculiarity of mind which the law has recognised as possibly differentiating a case of murder from one of culpable homicide." Lord Justice-Clerk Cooper (as he then was) in *Braithwaite*, 1945 J.C. 55 at 58, referred to the observations made in *Savage* and *Muir*, and stressed that it would not suffice to show that the accused was of very short temper or was unusually excitable or lacking in self-control. There must be established " something amounting or approaching to partial insanity and based on mental weakness or aberration."

Kirkwood, 1939 J.C. 36, was considered by the Whole Court, and is the leading modern authority on the importance to be attached to diminished responsibility when imposing sentence—a problem to be considered presently. In that case, dealing with the doctrine itself, the Lord Justice-General (Lord Normand) said that it was " justified in each case by medical testimony directed to the special facts of the case. The mental weakness or weakness of responsibility is regarded by our law as an extenuating circumstance, and it has effect as modifying the character of the crime, or as justifying a modification of sentence or both."

Carraher, 1946 J.C. 108, is another case of great importance. The pannel, who was charged with murder by stabbing the deceased with a chisel, was defended on a plea of diminished responsibility. This defence had two aspects. First, it was said, the accused was a case of psychopathic personality—which in itself should be regarded as bringing him within the ambit of diminished responsibility; while, secondly and alternatively, it was contended that psychopathic personality associated with the drink the accused had consumed should be accepted as justifying this defence. He was convicted of murder after Lord Russell had charged the jury that, unless the jury found evidence of illness due to alcoholism, they should dismiss from their minds the question of the drink consumed by the accused. At the hearing of the appeal, counsel for Carraher moved unsuccessfully that a psychiatrist should be appointed as assessor to sit with the Court, as was permitted by the Criminal Appeal (Scotland) Act, 1926, s. 6 (*e*). Lord Normand, again giving the judgment of the court,[18] stressed that trial by judge and jury was not to be subordinated to medical theories, and considered that the medical evidence at Carraher's trial regarding "psychopathic personality" was "descriptive rather of a typical criminal than of a person of the quality of one whom the law has hitherto regarded as being possessed of diminished responsibility." He also considered that diminished responsibility induced by drinking could not be accepted as a valid defence, and observed "I am of opinion that the plea of diminished responsibility, which as was said in *Kirkwood's* case, is anomalous in our law, should not be extended or given wider scope than has hitherto been accorded to it in the decisions."

Medical evidence and psychopathic personality

These observations merit special comment. A scrutiny of the decisions prior to *Carraher* does not in the present writer's view make it possible to *define* the scope of the doctrine. The one common characteristic in all the cases seems to be that *medical* evidence was adduced regarding the mental state of the accused, though in *Gove* (1882) 4 Coup. 598 Lord Deas had reminded the jury that "the evidence of medical men in questions of this kind was no more valuable than the common-sense judgment of the associates and friends of the panel." It may be thought that Lord Normand in *Kirkwood* had no more intention than had Lord Dunedin in *Brown* (1907) 5 Adam 312, by arbitrary rule of law, to exclude for all time consideration of results of medical research regarding certain aspects of mental disease. He might well have accepted his predecessor's view [19] "Courts of law, which are bound to follow so far as they can the discoveries of science and the results of experience, have altered their definitions and rules along with the experts." *Carraher,* it is thought, is not authority for the view that "psychopathic personality" or "character disorder" can *never* be accepted in Scotland as justifying the defence of diminished responsibility. In 1946, however, the judges were not convinced that this condition was sufficiently capable of medical diagnosis *ab ante*; and their rejection of Carraher's defence was presumably without prejudice to the possibility of accepting in future cases of psychopathic personality evidence of verified medical experience regarding this condition. Cases of " character disorder " or " psychopathic personality " differ, according to Sir David Henderson, from normal individuals quantitatively rather than qualitatively. Though sometimes of a high intellectual standard, many exhibit throughout their lives, or from a comparatively early age, conduct of an anti-social nature. They fail to develop an adequate sense of reality or responsibility and are determined to get their own way regardless of cost. Yet, since only a few extreme cases can be certified as insane, the majority remain a danger to society and can only be dealt with after they have committed crimes, which are often violent in character. At present there are in Britain no special institutions to deal with criminal psychopaths—who are notoriously difficult to influence by ordinary penal or medical treatment.[20] Sir David Henderson, and the Royal Commission on Capital Punishment,[21] considered that persons in this category should be treated as cases of diminished responsibility. It will be open to the Scottish courts to accept this view in the future by judicial development of the law, but such an extension does not seem imminent.

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[18] esp. pp. 117–118.

[19] 5 Adam at p. 343.

Intoxication and diminished responsibility

The relation between intoxication and diminished responsibility was, as stated, considered in *Carraher* ; and it was held in this case that an accused who could not be shown to be within the category of diminished responsibility when sober, could not be brought within that category by proof that he had taken drink. This proposition was recently reaffirmed by Lord Hill Watson in *MacLeod*, 1956 J.C. 20. It may be noted, however, that it was largely through the doctrine of diminished responsibility that the effects of drink were taken into consideration at all by Scottish criminal law. Hume [22] held in effect that intoxication was irrelevant as a defence. " The law of Scotland views this wilfull distemper with a quite different eye from the other (*scil.* insanity) which is the visitation of providence ; and if it does not consider the man's intemperance as an aggravation, at least sees very good reason why it should not be allowed as an excuse, to save him from the ordinary pains of his transgression." Lord Deas, who played the leading part in developing the doctrine of diminished responsibility in Scots law apparently considered persistent alcoholism as an element impairing responsibility, but did not accept drunkenness *per se* as a defence at all.[23] In *Brown* (1886) 1 Wh. 93, however, Lord McLaren expressed different views—namely, that an accused suffering from temporary insanity caused by drink was not in law responsible for his acts, and, further, that in crimes requiring a special intent such as murder, proof of intoxication might negative the existence of the intent to kill or inflict such grave injury as should be expected to kill, and thus the quality of the crime would be reduced to culpable homicide. The modern law regarding drunkenness as a defence in Scottish criminal law is substantially the same as that laid down in *D. P. P.* v. *Beard* [1920] A.C. 479 except, of course, that the specialties regarding "felonies" have no application in Scotland.[24]

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[20] See Report of the Royal Commission on Capital Punishment, pp. 137 *et seq.* ; *Mental Abnormality and Crime*, London, 1949, Chapter V ; also Norwood East, *Society and the Criminal*, 1949, Chapter VIII.

[21] § 401.

[22] *Commentaries* i, 45–47 and Bell's *Notes.*

Procedural considerations and punishment

In Scottish practice the operation of the doctrine of diminished responsibility is influenced by a system of criminal procedure which differs substantially from that of England. Particular mention may be made of the control exercised over all criminal prosecutions by the Lord Advocate and the Crown Office. In his discretion the Lord Advocate or his Deputes may elect to accept a plea of guilty to culpable homicide rather than press for conviction on a charge of murder.[25] In deciding whether to accept such a plea they will bear in mind such factors as diminished responsibility or provocation or a combination of each, and thus give effect to diminished responsibility without the trial taking its full course. Similarly, if a jury acquit of murder but convict of culpable homicide, some of those who give their verdict may have been influenced by a defence of provocation, others by a defence of diminished responsibility in the same case, and others perhaps by both defences. The jury does not disclose its reasons for convicting of the lesser crime. Again, the Scottish jury of fifteen returns its verdict by a majority. Thus if (say) four of the jury wish to convict of murder and eleven consider that they should convict only of culpable homicide, the majority view will prevail.

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[23] See *e.g.*, *Dingwall* and *Grainger sup. cit.* In *Grainger* he did not seem prepared to accept *delirium tremens* as the equivalent of insanity, but the verdict in that case must be considered in the light of Lord Deas's interpretation.

[24] See *Campbell*, 1921 J.C. 1; *Kennedy*, 1944 J.C. 171; *Carraher*, *sup. cit.* But in *McAleer*, H.C.J., May 3, 1951 (unreported) the L.J.-C. somewhat qualified the strictures of *Kennedy* by telling the jury that the onus on the defence, seeking to exclude intent, on grounds of drunkenness, was only to establish a balance of probability—not strict proof.

[25] *e.g.*, *Kirkwood*, *supra*.

Diminished responsibility, as has been explained, may operate to reduce the quality of the crime of murder to culpable homicide; but in general it is always a relevant consideration—whatever the crime—at the stage of passing sentence. When the judicial attitude to punishment was mainly concerned with retributive and deterrent factors, there was possibly a tendency " to punish the bad and excuse the mad "—so that the more an accused's responsibility was impaired the shorter would his sentence be. In modern times treatment of the accused and protection of society have been given greater stress, and a sentence of life imprisonment may well be thought justified in some cases on conviction of culpable homicide after an original charge of murder has been reduced on grounds of diminished responsibility. Thus in *Kirkwood,*[26] 1939 J.C. 36, a life sentence was imposed and sustained on appeal. The accused in this case had originally been prosecuted for murder but had offered a plea of guilty of culpable homicide on grounds of diminished responsibility—which plea the Crown had accepted. There was evidence that *inter alia* he had been treated for epileptic fits of a violent character. The Lord Justice-General (Lord Normand) observed (at pp. 40–41) " I cannot assent to the contention that the protection of the public is to be disregarded, nor to the implied separation of the panel's own protection from that of the public. . . . The interests of society include the reformation of the criminal, the prevention of the repetition of the crime by him or by others, and the protection of other members of the community. When a panel is convicted of a crime committed under an impulse which he is less able to resist than the normal person, and when there is evidence that the impairment of his powers of resistance may come into play after a long interval during which there have been no premonitary signs of danger, and when the crime has been one of atrocious ferocity, the protection of the public against its repetition is specially relevant." The Lord Justice-General pointed out that a prisoner such as Kirkwood while in prison would have his mental and physical treatment carefully considered, and, if necessary, ameliorative treatment would be given to him. Moreover, his case would be reviewed from time to time by the authorities who had power to control treatment and eventually order release.[27]

Diminished Responsibility under Statute

Section 2 (1) of the Homicide Act now makes provision regarding " Persons suffering from diminished responsibility " as follows:

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[26] Also in *Muir,* 1933 J.C. 46.

[27] In fact Kirkwood was released some years ago.

> " Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

This statutory definition does not extend to Scotland, where the doctrine of diminished responsibility will continue to depend on common law interpretation rather than on construction of statute, and will not be restricted to cases of homicide as in England. Though the English judges may well consider the leading Scottish authorities in determining the scope of section 2 (1), differences between the Scottish and English law regarding diminished responsibility may be expected to develop. Moreover, English criminal procedure is less suitable than the Scottish system in the actual operation of the defence. A considerable number of Scottish verdicts of guilty of culpable homicide (where diminished responsibility has been pleaded to reduce the quality of the crime) have been majority verdicts. In English practice, where the jury must be unanimous, a retrial will be necessary in cases where the whole jury cannot agree to accept or reject the defence of diminished responsibility. This difficulty will not, however, arise when trial is by court-martial (where, except in cases where the death sentence is imposed, decision may be by majority vote).[28]

Mr. Silverman tried unsuccessfully at the Bill stage to have deleted from section 2 (1) the words " whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury." The Government insisted on these words, however, presumably to ensure that the defence of diminished responsibility should be confined to cases which could be supported by medical evidence. This has been the practice in Scotland, though Lord Deas's observations in *Gove* apparently contemplated that such evidence was not indispensable. Factors such as jealousy, hate and anger (provocation apart) have not been regarded in Scots law as sufficient to justify the defence, unless they induce prolonged morbid brooding and have had a lasting effect on the mind. This may well also be the view of the English courts. On the other hand, it will be open to English judges to construe the statutory language so as to bring cases of psychopathic personality within the scope of the defence, which is not at present the position in Scotland.[29] English law is apparently to retain the McNaghten Rules (which do not bind the Scottish courts) as the test for the defence of insanity.[30] Thus in cases where alternative defences of insanity and diminished responsibility are urged, the results on similar facts may well differ in Scotland and England.

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[28] Army Act, 1955, s. 96.

[29] See p. 359, above.

No general theory of "attenuating circumstances"

The restriction of the defence of diminished responsibility to cases which can be founded on medical evidence—if this is the construction favoured by the English courts—may be contrasted with the law regarding provocation which by section 3 of the Act in cases of murder is now also brought close to the common law of Scotland. Both provocation and diminished responsibility are given weight by the law because they are attenuating circumstances impairing the responsibility of the accused. The defence of provocation does not depend on medical evidence but usually derives its validity from the fault of the victim. The converse is true of diminished responsibility, if the Act of 1957 is construed according to the expressed intentions of its sponsors in Parliament. Yet in fact the effect on Othello's mind of Iago's intrigue did not differ from that which would have resulted from provocation through a confession of adultery by Desdemona. Is it altogether logical to distinguish the cases absolutely? As yet, however, neither Scottish nor English law have accepted a general theory of "attenuating circumstances."[31]

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[30] See H.C. Debates, Vol. 560, col. 1252; November 15, 1956.

[31] A Ph.D. thesis by Dr. M. R. Wright in the Library of Aberdeen University was sustained in 1956 on the title "The Development of Legal Responsibility in the Criminal Law of Scotland." This thesis contains *verbatim* extracts from the medical evidence in a number of important cases concerned with diminished responsibility. These extracts were made from records kept by the Clerk of Justiciary in Edinburgh. Dr. Wright also sets out in Appendices a number of important unreported cases on diminished responsibility, extracted from these records. Special mention may be made of the following trials dealt with in this useful thesis.

Brown, H.C.J., Dec. 10, 1946 (*dementia praecox*).

Gibbon, H.C.J., Jan. 4, 1949 (heart disease affecting brain, see also *McKewon*, unreported 1955).

McCafferty, H.C.J., May 1, 1951 (sexual excitement and history of insanity 16 years before but no positive evidence of continuing aberration).

McAleer, H.C.J., May 3, 1951 (effect of drink on intent to kill or cause dangerous injury).

Smith, H.C.J., July 24, 1951 (drink and personal grief).

Miller, H.C.J., Jan. 6, 1953 (early history of St. Vitus's dance, discussion of electro-encephalogram evidence).

Robertson, H.C.J., June 1, 1954 (charge distinguishing between mental sickness and moral wickedness; accused had wished to plead guilty to murder).

Dr. Adams' Trial for Murder

By Henry Palmer

On December 19, 1956, Dr. John Bodkin Adams was arrested and charged with the murder of Mrs. Morrell. According to the arresting officers his first words were: "Murder? Can you prove it?" Sixteen weeks later, after a trial lasting seventeen days, Mr. Justice Devlin repeated those same words to a jury of ten men and two women, who after considering their verdict for forty-four minutes returned a verdict of Not Guilty.

Perhaps the most interesting aspect of an unusual trial was that the act of murder itself had to be proved by expert medical evidence. As Dr. Adams had not given evidence in his own defence, the decision of the jury rested mainly on the facts as presented by the proscecution, modified by cross-examination.

Mrs. Morrell, an old lady of eighty-one years of age, died on November 13, 1956. She had been a patient of Dr. Adams since 1948. Evidence was led at the preliminary hearing to indicate that Dr. Adams prescribed and administered such large quantities of drugs, particularly heroin and morphia, that he must have known the result would be to kill Mrs. Morrell. Even though there might be some cases, for instance where the patient was suffering severe pain or restlessness, in which a doctor might be justified in administering very large doses of drugs, it was said that this elderly lady was not suffering either from severe pain or restlessness to such an extent as to justify such doses, and in fact was in a coma for the last days of her life.

It is, of course, not possible to deal fully with all the argument and evidence in this article, but it is hoped in subsequent articles to set out in detail some aspects of the trial and in particular the cross-examinations of the vital witnesses. The purpose of this article is to summarise the case, so far as possible, and to provide the background for the articles that are to follow.

The case will undoubtedly become a classic. It will always be remembered for the introduction by the defence, possibly more effectively than in any previous criminal trial, of new evidence which had the effect of fundamentally altering the nature of the case; notably by the production of the notes made at the time of Mrs. Morrell's last illness by the nurses attending her and of hospital records relating to the time prior to Mrs. Morrell coming under Dr. Adams's care. The effect of the first piece of new evidence was to contradict much of the nurses' oral evidence and to show that their recollections after a lapse of over six years were very unreliable. The second piece of new evidence was introduced with devastating effect to show, in the face of the Crown's medical evidence, that another doctor had considered it right to prescribe morphia for Mrs. Morrell over a period of eight days while she was in hospital prior to her coming under Dr. Adams's care.

The Crown was represented by Sir Reginald Manningham-Buller, Q.C., the Attorney-General, Mr. Melford Stevenson, Q.C. and Mr. Malcolm Morris and Dr. Adams was represented by Mr. Geoffrey Lawrence, Q.C., Mr. Edward Clarke and Mr. John Heritage.

The Crown Case as Opened

The Attorney-General, opening the case to the jury, said that, in the submission of the Crown, Dr. Adams, by the administration of drugs to Mrs. Morrell, either given by him or on his instructions, killed her. Those drugs, he said, were given with the intention of killing. From January 1949, Mrs. Morrell was attended by nurses. These were Sister Randall, Sister Mason-Ellis, Nurse Stronach and Nurse Hughes. According to Nurse Stronach, there were times when Mrs. Morrell complained of pain, although Nurse Hughes would say that Mrs. Morrell never complained to her of being in any pain. Doctor Douthwaite, a Harley Street specialist, would say that he had formed the opinion that Mrs. Morrell was suffering from cerebral arterio-scelerosis, otherwise known as hardening of the arteries of the brain. She was also suffering from the results of a stroke, and it was unusual for pain to accompany such conditions.

Evidence would be given, continued the Attorney-General, that in the ten and a half months prior to Mrs. Morrell's death Dr. Adams had prescribed for her barbiturates amounting to 1,629$\frac{1}{2}$ grains, sedormid, a sleeping drug, amounting to 1,928 grains, morphia or morphine amounting to $164^{11}/_{12}$ grains and heroin amounting to 139$\frac{1}{2}$ grains. These were dangerous drugs. Dr. Ashby, a second Harley Street specialist, would say that he could think of no legitimate reason why either the morphia or heroin, or a combination of both, should have been given. He would also give his opinion that morphia or heroin or a combination of both would, if administered over a period, result in a serious degree of addiction.

Dr. Adams, continued the Attorney-General, was the source of supply for these drugs. Perhaps the reason why they were administered lay in the changes made by Mrs. Morrell in her will after she had been taking the drugs. It might be thought sinister that, during the period when these very substantial quantities of morphia and heroin were being prescribed, Dr. Adams was concerning himself about Mrs. Morrell's will. A Mr. Sogno, who was Mrs. Morrell's solicitor, would give evidence of a very curious conversation with Dr. Adams, on March 8, 1950. At this conversation Dr. Adams told Mr. Sogno that Mrs. Morrell intended to leave a Rolls-Royce car and the contents of a case containing jewellery, and asked him to prepare a codicil which could later be destroyed if it did not meet with Mr. Morrell's (the son's) approval. Subsequently Mrs. Morrell did, in fact, execute a codicil to her will leaving to Dr. Adams, if her son pre-deceased her, her house and all her personal chattels. But less than a month later she executed a fresh will leaving to him an oak chest containing silver which was in her dining room and, if her son predeceased her, the Rolls-Royce and an Elizabethan cupboard.

The Attorney-General said that Superintendent Hannam, who was in charge of the case, went to Dr. Adams's house with a search warrant for dangerous drugs on November 24, 1956. During a conversation Supt. Hannam asked whether all the drugs prescribed for Mrs. Morrell had been administered to her. Dr. Adams replied that all had been given to the patient. When it was pointed out to the doctor that he had prescribed 75 one-sixth grain tablets of heroin the day before Mrs. Morrell died, he replied, according to the superintendent, that she was in "terrible agony."

The Attorney-General emphasised that Dr. Adams had used the phrase "terrible agony," whereas the nurses would say that Mrs. Morrell was in a coma days before her death. On November 12, 1956, at ten p.m., Mrs. Morrell was lying in a coma, when Dr. Adams came and prepared an injection in a five cubic-centimetre syringe. The syringe was three-quarters full and he instructed Sister Randall to inject it into the unconscious woman, which she did. Dr. Adams then prepared a second similar injection and gave instructions that it should be given later if the patient had not become quieter. At this time Mrs. Morrell was having jerky spasms, and after that first injection she quietened down for a time. Later, when the patient had further spasms, Sister Randall gave the second injection, and at two a.m. the following morning Mrs. Morrell died.

What possible reason, asked the Attorney-General, could there have been for these last two unusually large injections being given to this unconscious woman? Mrs. Morrell was not in pain and was in a coma, and if Dr. Douthwaite and Dr. Ashby were right, she was already suffering from excessive morphia and heroin injections, which were causing the convulsions. The submission of the Crown was that the only possible conclusion was that, whether by means of these two injections or the lethal prescriptions in the preceding period, Dr. Adams killed Mrs. Morrell deliberately and intentionally. One further piece of evidence was that on the cremation certificate, filled in by Dr. Adams after Mrs. Morrell's death, he had stated that he was not a beneficiary under the will so far as he was aware. That, of course, was not true, if the evidence of the police officers was right that he, Dr. Adams, had admitted he knew he would benefit under the will. Dr. Adams had told the police that that was not done wickedly but that he liked cremations to go smoothly.

The Evidence

The nurses' evidence

The first of Mrs. Morrell's nurses to give evidence was Nurse Stonach, who had nursed Mrs. Morrell up to eleven days before she died. She said that she gave hyperdermic injections of one-quarter grain of morphia each night on Dr. Adams's instructions. Dr. Adams came himself each night at about eleven and gave a further injection, but she did not know what these injections were because it was Mrs. Morrell's wish that the nurses should not be in the room at the time. The drugs used by the nurses were kept in a drawer in the dining room. Dr. Adams would get his injections from his bag. By the time Dr. Adams gave his injections Mrs. Morrell would be very dopey and half asleep. The patient was getting weaker in every way during her period of nursing and on her last day there, November 2, Mrs. Morrell was "almost semi-conscious and rambling." She added that she saw no real signs of pain.

Cross-examined by Mr. Lawrence, Nurse Stronach said that she was relying upon her memory of what happened in one case six or seven years ago. She said that she and the other nurses wrote down every injection they gave and recorded everything of significance in the patient's illness in a book. The doctor's visits would also be recorded therein. It was at this point that Mr. Lawrence produced the first of a number of exercise books which contained the actual records which Nurse Stronach had referred to. After a number of entries had been read to the witness, it became clear that in several respects her recollection was seriously at fault. Out of a number of instances, perhaps the most outstanding was that disclosed by the entry for November 2. That entry showed that Mrs. Morrell's lunch consisted of "partridge, celery, pudding and brandy and soda." It followed that Nurse Stronach had been wrong in saying that Mrs. Morrell on that day had been "semi-conscious and rambling."

The second nurse, Sister Mason-Ellis, agreed with Mr. Lawrence that on November 12 Mrs. Morrell could not have been in a coma because her entry in a report for that afternoon stated "awake but quiet." This witness also dealt at some length with the nursing routine in Mrs. Morrell's house and also with certain aspects of general nursing practice relating to the use of drugs.

The third nurse, Sister Randall, described Mrs. Morrell's last hours. Dr. Adams, she said, gave an injection of paraldehyde, refilled the syringe, and gave it to her with instructions to inject it if the patient was restless. She did inject the second dose and at two a.m. the patient passed away. During her last hours, Mrs. Morrell had suffered from jerkings. In cross examination Sister Randall admitted that the entry in the report for the last night did not contain any reference to jerkings but merely stated that the patient was "very shaky at twelve thirty a.m.," the words "very shaky" being underlined twice. However, she insisted that she could remember the jerks and how very dreadful they were. The record for that last night contained no reference to the second injection of paraldehyde, and the witness could not explain why that had been omitted, but she nevertheless insisted that that second injection had been given. It was also pointed out to her that at the Magistrates' Court she had said that Mrs. Morrell was in a coma for two or three days before she died. Sister Randall would not withdraw her evidence on this point, even in the face of the contemporaneous report, but said that she must have meant that Mrs. Morrell was in a heavy sleep.

Nurse Hughes, the last of the nurses to give evidence, said that she at no time observed any sign of severe pain. Asked about an entry in the report for October 9, where she had written "query stroke?," she said that she would not have made that diagnosis on her own, and that it was probably suggested to her by the doctor. She said that in the last few days of Mrs. Morrell's life her condition could be described as semi-comatose and that she thought that was attributable to the large quantity of drugs she had been given. Like the other nurses she agreed with Mr. Lawrence that there was no record of Mrs. Morrell being in a coma on November 11 or 12, that is the days immediately preceding her death.

The medical evidence

The first of the two expert medical witnesses called by the Crown was Dr. Arthur Henry Douthwaite, a Harley Street specialist and senior physician at Guy's Hospital. Dr. Douthwaite said that, in his opinion, the cause of the stroke suffered by Mrs. Morrell in 1948 was in all probability cerebral thrombosis. The proper course of treatment for such a patient was within a few days to encourage movement and to make use of massages and exercises. It was wrong in all circumstances to inject heroin and morphia, and morphia alone should not be given unless there was an episode of acute mania and then only a single injection. Heroin alone should not be given to people over seventy years of age unless they were suffering from some incurable disease. The administration of morphia and heroin to a patient like Mrs. Morrell would seriously imperil a resumption of normal life. Some degree of irritability would be shown by a patient for a few days after a stroke but it would soon pass of ; the irritability in Mrs. Morrell's case might have been caused by the hardening of the arteries of the brain, but the administration of morphia and heroin for that condition would be completely unjustified. Morphia and heroin would lead to addiction and would increase the degree of irritability. Morphia alone could only legitimately be given daily over a prolonged period in cases of severe pain which could not be quelled by any other means. The administration of heroin stimulated the spinal cord much more violently than morphine and would give rise to jerkings, twitchings and vomiting. Once tolerance had been acquired to both drugs, which would be within two or three weeks, larger doses would be required to secure any effect. The doctor dealing with acquired tolerance could either increase the drugs or stop them, but to maintain the dosage at the same level over a long period would keep the patient in a state of almost constant craving and would cause excitability and bad temper.

The typical feature of paraldehyde, continued Dr. Douthwaite, was the smell. It was a drug which could properly be used to stop twitchings, but its effect if superimposed upon a heavy administration of heroin and morphia would be likely to produce death.

Looking at the nurses' reports for the period between June, 1949, and November, 1949, continued Dr. Douthwaite, there was, in his opinion, no sufficient increase in heroin and morphia to counteract the patient's acquired tolerance. The result of a rapid increase in the dosage would produce a deep sleep or coma. Looking at the dosage leading up to the time of Mrs. Morrell's death on November 13, 1950, as shown in the nurses' reports, and making allowances for acquired tolerance, the result was bound to be jerky spasms or convulsions and, ultimately, death ; as to the dosage in the last few days, November 8 to 12 inclusive, he (Dr. Douthwaite) could only come to the conclusion that it was given with the intention of causing death. The effect of the administration of paraldehyde on November 12 would make death more certain than it already was. If the amount of drugs shown on the list of prescriptions for November, 1950 (which exceeded the amount shown in the nurses' reports) had been given, it would have killed Mrs. Morrell. There was, in his opinion, no legitimate reason for the prescription of the amounts of heroin and morphia from November 8 onwards.

Dr. Douthwaite added that there were no signs in the nurses' reports which justified Dr. Adams' conclusion, as stated by him on the cremation certificate, that Mrs. Morrell died from cerebral thrombosis.

In cross-examination by Mr. Lawrence, Dr. Douthwaite was asked to look at the nurses' reports made at the hospital in Cheshire where Mrs. Morrell had been treated for a stroke in June, 1948. Dr. Douthwaite agreed that these notes showed that Mrs. Morrell had complained of severe pain, that after two nights of attempting to give her sleep and sedation by means of barbiturates the doctor at the hospital had resorted to morphia and that morphia had been given to her every night for the remainder of her stay at the hospital. As a matter of medical practice, he said, he condemned the use of morphia if used simply for a stroke. He agreed that it would not have been unreasonable for a doctor to form the view that after this stroke Mrs. Morrell's expectation of life might reasonably be put at six to twelve months. Dr. Douthwaite, agreeing with Mr. Lawrence, said that no doctor would think that a woman of 79 or 80 could be restored to her pre-stroke health and that the doctor could only do his reasonable best to make life tolerable for her in such a case. Dr. Adams had continued the morphia injections started at the hospital in Cheshire and, if the irritation worsened, the time would come when the doctor would be faced with a dilemma. The dilemma was this: either to stop the drugs and thus risk a collapse probably followed by death, or to increase the dosage. Dr. Douthwaite agreed that this was one of the most difficult problems that faced a general practitioner. In selecting a drug in the case of a person with a short expectation of life, the disadvantages of heroin and morphia would be far less than where the patient might live for an indefinite time. The witness added that he was interested in the drugs as prescribed and that as far as he was concerned any "special injections" (those injections noted in the nurses' reports as having been given by Dr. Adams in the absence of the nurses of which, they said, the contents were unknown to them) could be disregarded. Dr. Douthwaite was closely questioned about the nursing reports covering the period November 8 to 12, 1950, and agreed that the treatment appeared to have procured sleep up to the last night when paraldehyde was introduced. Paraldehyde was a remedy for insomnia and was one of the safest of the hypnotic (*i.e.*, sleep-inducing) drugs. The witness said that he had been forced to postulate an intent to terminate life from the quantity of drugs given to Mrs. Morrell in the last few days.

In further cross-examination by Mr. Lawrence, Dr. Douthwaite said that in the case of a patient suffering severe pain, as for example in a case of inoperable cancer, the use of the same quantity of drugs given to Mrs. Morrell would have been justified. In the present case the use of that quantity of drugs was not justified because there was not severe pain. In answer to questions by the judge, Dr. Douthwaite said that he was forced to the conclusion that Dr. Adams gave the paraldehyde on the last night because he was tired of waiting for the morphia and heroin to act; he was forced to the conclusion that a doctor with Dr. Adams' qualifications must have known that the treatment given to Mrs. Morrell in the last days of her life could not have been given due to ignorance, error or incompetence, but must have been given with an intent to kill.

Although Dr. Douthwaite had said earlier in his evidence that it was the dosage between November 8 and 12 that forced him to postulate an intent to kill, in answering questions put by the judge he said that morphia had been withdrawn from the patient between November 1 and 5 and had not been replaced by an adequate substitute. When morphia was reintroduced on November 6 the morphia tolerance would have been reduced and the administration of the dosage shown in the reports must, in his (Dr. Douthwaite's) view, have been intended to kill. Cross-examined on this point by Mr. Lawrence, the witness said that he thought he had formed this opinion after he had first gone into the witness-box. He agreed, however, that where tolerance to morphia was acquired there was acquired also, in some degree, a cross-tolerance for the chemically similar heroin. The theory, the witness added, was based on accumulation of drugs in the body.

The second expert medical witness called for the Crown was Dr. Michael George Corbett Ashby, a Harley Street neurologist and consultant neurologist to six hospitals. Dr. Ashby said that, looking at the nurses' reports, there was no evidence of shortage of sleep or severe pain or discomfort to such a degree as would justify the doctor giving priority to relieving discomfort over chances of survival. There were circumstances, he said, in which the easing of a dying patient was justified, but there was, in the present case, no positive evidence of the agonising pain or discomfort which might justify such a course. The witness said that he did not think Mrs. Morrell would have died if the drugs shown in the nurses' reports for November 10, 11 and 12 had not been administered. Mrs. Morrell, he added, could not possibly have survived the quantity of morphia and heroin prescribed for her between November 8 and 12.

Cross-examined by the defence, Dr. Ashby looked at an entry in the nurses' reports for October 9, 1950, which contained the words "query stroke." The witness said that any noticeable deterioration in the condition of the patient from that date onwards was compatible with a cerebral vascular accident, but also equally compatible with a heavy injection of morphia or heroin at that time. Dr. Ashby said that he was of the opinion that Mrs. Morrell was a dying woman on November 8 or 9, and that a possible interpretation of the drugs given to her on and after November 8 was that they were given in order to promote her comfort. Looking at the report for the night of November 12–13 it was not possible to rule out the possibility that death was the result of natural causes, as for example, a further cerebral haemorrhage. In those circumstances Dr. Adams might well have thought that cerebral thrombosis was the immediate cause of death.

Dr. John Bishop Harman, a Harley Street physician and consulting physician at St. Thomas' Hospital, was called as an expert medical witness for the defence. Dr. Harman said that it seemed clear that Mrs. Morrell had had quite a severe stroke in June, 1948, and was in a rather difficult mental condition. He was not prepared, he said, to condemn the use of morphia in such circumstances and saw nothing sinister in the subsequent introduction of heroin. Speaking of the period up to April, 1950, the witness said that he could see no evidence that the drugs were doing any harm and, after that date, they would certainly have to continue because Mrs. Morrell was then addicted. The result of withdrawal from April, 1950, onwards, he said, would have been a clear-cut illness of about ten days which would have been extremely unpleasant. When the last few days of Mrs. Morrell's life were reached, said Dr. Ashby, the drugs were being given, in his opinion, to stop the patient getting excited and they were not working very effectively. On the night of November 12 an injection of paraldehyde was given which was well within the normal dose. On the evidence of the nurses, Dr. Harman said that in his opinion the death was not a morphine death. So far as the doses of drugs recorded in the nurses' report were concerned, the witness said that he did not regard them as freak doses; death might well have occurred as a result of them but he could not say that it would necessarily have occurred. As an alternative to morphia and heroin he would have turned to paraldehyde, as had Dr. Adams.

Cross-examined by the Attorney-General, Dr. Harman said that he was not sure how likely it was that Mrs. Morrell would have survived the administration of the quantity of drugs prescribed for her between November 8 and 12. He said that he had had many patients under his care who had had strokes but that he had never used morphia and heroin for such a patient. Most of Mrs. Morrell's symptoms, continued, Dr. Harman, were symptoms of her illness and not of medication; the dosage contributed neither directly nor indirectly to her death.

Motive

Mr. Hubert Sogno, an Eastbourne solicitor who formerly acted for Mrs. Morrell, gave evidence for the Crown that on March 5, 1950, he had had a conversation with Dr. Adams. Dr. Adams had said that Mrs. Morrell desired him to have under her will a Rolls-Royce motor-car and also the contents of a locked box kept at the bank. Dr. Adams had suggested, said the witness, that a codicil should be prepared on Mrs. Morrell's behalf which could be later destroyed if it did not meet with the approval of Mrs. Morrell's son. After the date of this interview Mrs. Morrell made a number of testamentary dispositions leaving various items of property to Dr. Adams. Mrs. Morrell's last will was made on August 24, 1950, under which Dr. Adams was to receive an oak chest containing silver and also, if her son predeceased her, the Rolls-Royce car. In September Mrs. Morrell made a codicil to her will, the result of which was to exclude Dr. Adams completely from the will. The witness produced the codicil, which had been torn up into small pieces. In cross-examination Mr. Sogno said that after Mrs. Morrell's death Dr. Adams did, in fact, receive the oak chest containing silver and the Rolls-Royce motor-car, not because he was a beneficiary under the last will, but as an act of favour by Mr. Morrell, the son.

Detective-Superintendent Herbert Hannam, giving evidence, said that on October 1, 1956, he had met Dr. Adams by accident when, in the course of conversation, reference had been made to a chest of old silver. According to the superintendent, Dr. Adams had said: " Mrs. Morrell was a very dear patient. She insisted a long time before she died that I should have that in her memory. I never wanted it. I am a bachelor and I never used it, but I knew she was going to leave it to me and her Rolls-Royce car. She told me she had left it in her will." Then Dr. Adams had added: " Oh, yes, and another cabinet." The superintendent said he had then asked about the cremation certificate in which Dr. Adams had stated that he was not a beneficiary under the deceased's will so far as he was aware. Dr. Adams' reply was: "It was not done wickedly. We always want a cremation to go off smoothly for the dear relatives. If I said I knew I was getting money under the will they might get suspicious, and I like cremations and burials to go smoothly. There was nothing suspicious really. It was not deceitful."

Dr. Douthwaite, giving evidence on this point, said that the normal patient's attitude towards a doctor who was giving drugs which resulted in a feeling of pleasure was one of dependency. In such a case the doctor would get an ascendancy over the patient once that patient was addicted. Answering questions put by the judge, Dr. Douthwaite said that, from the medical picture in October, 1950, he would have expected Mrs. Morrell to live for a matter of weeks, probably not more than two months. It was his (Dr. Douthwaite's) opinion that Dr. Adams might have been embarking on a course, starting on November 1, that in fact took thirteen days to bring about her death.

Summing-Up

Devlin J., summing-up to the jury, said murder was an act or series of acts, done by the prisoner, which were intended to kill, and did in fact kill. It did not matter whether Mrs. Morrell's death was inevitable and that her days were numbered. If her life were cut short by weeks or months it was just as much murder as if it was cut short by years. There had been a good deal of discussion as to the circumstances in which doctors might be justified in administering drugs which would shorten life. Cases of severe pain were suggested and also cases of helpless misery. The law knew of no special defence in this category, but that did not mean that a doctor who was aiding the sick and dying had to calculate in minutes or even hours, perhaps not in days or weeks, the effect on a patient's life of the medicines which he would administer. If the first purpose of medicine—the restoration of health—could no longer be achieved, there was still much for the doctor to do, and he was entitled to do all that was proper and necessary to relieve pain and suffering even if the measures he took might incidentally shorten life by hours or perhaps even longer. The doctor who decided whether or not to administer the drug could not do his job if he were thinking in terms of hours or months of life. The defence in the present case was that the treatment given by Dr.

Adams was designed to promote comfort, and if it was the right and proper treatment, the fact that it shortened life did not convict him of murder.

The judge, continuing his summing-up, told the jury that as a matter of law there was no evidence from which they could infer that any drugs were administered to Mrs. Morrell over and above the injections recorded in the nurses' books. The quantity shown on the lists of prescriptions must be disregarded. The jury might think, or suspect, that these drugs were disappearing and being dealt with in some dishonest way. If the jury were to begin to wonder which of the people concerned was most likely to have been so dealing with them they ought, in fairness to Dr. Adams, to bear in mind that two of the nurses had told lies concerning the drugs in the witness-box.

As to the act of murder, the judge said that it was a most curious situation that that act had to be proved by expert evidence. The jury must either go the whole way with Dr. Douthwaite or say that Dr. Ashby's evidence was borderline and that it would not, therefore, be safe to act on borderline evidence in matters of murder.

On the question of motive the jury might well think it was not a very great achievement for a doctor who had pursued this policy of getting a patient under his influence by turning her into a drug addict to have obtained an oak chest of silver valued at £276, which compared with £300 to the night nurse and £1,000 to the chauffeur. In considering whether Mrs. Morrell was ever unduly influenced by Dr. Adams, the jury ought to bear in mind that the usual mark of undue influence was that the person exercising the influence was able to extract something which he ought not to have got. This bequest, so far from being something that in the opinion of the relatives Dr. Adams ought not to have had, was added to by Mr. Morrell; that might help the jury to decide whether this was really a case of undue influence exercised by Dr. Adams. The defence had said that it was ludicrous to suggest that Dr. Adams had anticipated Mrs. Morrell's death by a few days or weeks for a chest of silver valued at £276. That was a strong point to which no answer had been put forward by the Crown. In fairness, it ought to be said, on the other side, that there was evidence that Dr. Adams displayed considerable interest in acquiring some legacy under the will. But even having regard to that the jury might think it was a paltry reward to stimulate a doctor into committing a murder which, if the prosecution was right, required plans to be made long in advance in order to get the patient under his influence.

The judge told the jury that on the question of the cremation form it was for them to decide whether or not it was false. The answer which Dr. Adams had given: " Not so far as I am aware," had to be set side by side with the answer given to Superintendent Hannam that he knew he was going to get the oak chest and the car.

Acquittal

On April 9, 1957, the seventeenth day of the trial, John Bodkin Adams was acquitted of the murder of Edith Alice Morrell at Eastbourne in 1950 and was discharged. The Attorney-General then told the court that he had reached the conclusion, having considered all the circumstances, that the public interest did not require that Dr. Adams should undergo a further trial on a second indictment of the murder of a Mrs. Hullett, and he had, therefore, entered a *nolle prosequi* in respect of that indictment.

Devlin J. then told Dr. Adams that all further proceedings on the indictment were stayed and there would be no further action taken by that court. Dr. Adams was then discharged.

Restitution in Criminal Proceedings

By C. Howard, LL.M.

(*Continued from p.* 316)

Parties

(i) *Applicant*

Although nothing in the wording of section 45 indicates that an application to the court is necessary, there will normally be one. The proper person to apply is the " owner " to whom the property is to be restored. In this context it should be remembered that the " owner " of goods for the purpose of an indictment for larceny is not necessarily the same as the " owner " of them for the purpose of the civil law of title. For larceny, the property in goods can be laid in a servant from whom they were taken [35]; but as far as the civil law is concerned, the owner of the goods is the servant's master. The word "owner" in section 45 refers to the person who has the civil law title to the property.

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[35] *Harding* (1929) 21 Cr.App.R. 166.

The distinction between the criminal and the civil law meanings of "owner" is well illustrated by *Buller* v. *Brooks* (1930) 46 T.L.R. 233. In this case the plaintiffs were wholesale vendors of jewellery. They had an arrangement with certain retailers whereby the latter would send customers direct to the plaintiffs. These customers would choose items for purchase at the plaintiffs' premises and be allowed to take them away. The plaintiffs would then charge the retailers with the wholesale price of the goods sold, and the retailers in turn charged the customers with the retail price. One customer took jewellery from the plaintiffs' premises in circumstances which led to his conviction for larceny of the goods from the plaintiffs. Before arrest he had pawned the jewellery with an innocent pawnbroker. On the conviction the plaintiffs applied for an order of restitution, which was refused. They now sued the pawnbroker, relying on the Sale of Goods Act, s. 24 (1). After holding that the action failed on his finding that the offence committed was in fact obtaining and not larceny, Wright J. went on to say (46 T.L.R. 234):

> "But apart from these considerations there is a more fundamental point which I think is fatal to any claim by the plaintiffs under section 24 (1). I think that the words "owner of the goods" in that section means (*sic*) the owner from whom they were actually stolen, and not some previous owner from whom that owner derived title."

In this case the sale by the plaintiffs had been to the retailers and not to the offender. Hence, as far as the civil law was concerned, the plaintiffs had no title to sue, although the property was correctly laid in them for the purpose of the indictment for larceny.

The only other case bearing on the meaning of "owner" in the context of restitution is *Jones* (1881) 14 Cox C.C. 528, where there was a conviction under the Post Office Act, 1837, for stealing a letter. The Postmaster-General was the prosecutor and the property was laid in his name. Fry J. refused an order of restitution, remarking that it was not clear that this individual was the owner of the stolen letter. It is clear that for the purpose of restitution he was not. In this connection the Prosecution of Offences Act, 1879, s. 7, should be borne in mind. The last paragraph of this section enacts that for the purpose of enabling a person to obtain a restitution of property, or any other benefit, a prosecution by the Director of Public Prosecutions is equivalent to one by the individual concerned. This is subject to the proviso that "all reasonable information and assistance" be given in the proceedings.

(ii) *Respondent*

People other than the offender against whom orders of restitution have been made include an innocent agent of the accused,[36] the accused's trustee in bankruptcy, apparently,[37] and a bona fide pawnbroker.[38] Anyone against whom an order is asked for is entitled to be heard in opposition to it. In *Macklin* (1850) 5 Cox C.C. 216, prosecuting counsel argued that as the pawnbrokers into whose hands the stolen property had come were not parties to the proceedings, they had no *locus standi* to be heard in opposition to an order. It was held that as persons against whom the order might be made the pawnbrokers ought to be heard, and this principle has never since been disputed.[39]

It is probable that no order can be made where a husband or wife is convicted under the Married Women's Property Act, 1882.[40] There is no authority on the point,[41] but the discretionary remedy for determining title to property in section 17 of the Act, and the prohibition of actions in tort in section 12, indicate that the legislative policy is against it.[42]

Subject-Matter of an Order

(i) *The original property*

Orders of restitution can only be made in respect of property which is the subject of the criminal charge.[43] It follows that only property which is both specified in the indictment and identified at the trial can be made the subject of an order.[44]

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[36] *Justices of the Central Criminal Court* (1886) 18 Q.B.D. 314; *Powell* (1837) 7 C. & P. 640.

[37] *Cohen* (1907) 71 J.P. 190. Trustees in bankruptcy may also care to keep a wary eye on *Re Vautin* [1899] 2 Q.B. 549.

[38] *Stancliffe* (1869) 11 Cox C.C. 318.

[39] See also *Ford* (1869) 11 Cox C.C. 320.

[40] ss. 12 and 16 respectively.

[41] *Payne* [1906] 1 K.B. 97, quoted in Halsbury's *Laws*, 3rd ed., Vol. 10, p. 816, para. 1579, note (*g*), is no help.

[42] The argument in *Jones*, that an offence charged under the M.W.P.A. would not be an offence specified in the Larceny Act, does not apply here. The M.W.P.A., ss. 12 and 16, do not create offences.

[43] *London Corporation* (1858) E.B. & E. 509.

[44] *Goldsmith* (1873) 12 Cox C.C. 594; *Smith* (1873) 12 Cox C.C. 597. Dogs are goods: *Slade* (1888) 21 Q.B.D. 433; so are goats: *Dover* v. *Child* (1876) 1 Ex.D. 172, *sub silentio*. Dogs are also property: *Mirams* v. *Our Dogs Publishing* [1901] 2 K.B. 564. As to a cow and a dead calf, see *Scattergood* v. *Sylvester* (1850) 15 Q.B. 506; 117 E.R. 551. Where horses are concerned, beware of the Sale of Horses Acts, 1555 and 1588

(ii) *Proceeds*

There is no doubt that if the accused has disposed of stolen property, restitution may be ordered of proceeds identified in his possession instead. Section 46 (1) of the Larceny Act defines " property " to include " any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise." The principal English case establishing the rule is *Justices of the Central Criminal Court* (1886) 18 Q.B.D. 314, but examples are to be found both before and after that date.[45] It has been followed in New Zealand[46] and Canada.[47] As to what is property or proceeds, the definition in section 46 (1) seems wide enough to cover any eventuality.[48] It need hardly be said that the owner is not entitled to both property and proceeds.[49]

There is no English authority on whether the property or the proceeds should be restored when both are in court. On principle, it seems most likely that the owner has a right of election. If all else were equal it might be suggested that where an innocent third party has paid a fair price to the thief, and that price has been recovered, he should be entitled to keep the property. All else, however, is not equal. Section 45 (3) of the Larceny Act[50] makes it clear that, apart from the provisos in section 45 (2), in this part of the law the emphasis is on the rights of the owner. It seems from this that the views of the purchaser are to be subordinated to those of the owner.[51] The question is unlikely to arise, however, because if the court does not think the owner should have his property back in specie, it can refuse to make an order of any kind.[52] The Canadian case of *Ex parte Selig* (1910) 39 N.B.R.

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[45] *Powell* (1837) 7 C. & P. 640; *London Corporation* (1858) note 43 above *George* (1901) 65 J.P. 729; *Cohen* (1907) 71 J.P. 190.

[46] *Doyle* (1891) 10 N.Z.L.R. 167: money of other denominations the proceeds of stolen money.

[47] *Howe* v. *Schroeder* [1905] 1 W.L.R. 174: a horse the proceeds of a mule

[48] In *Stanton* (1836) 7 C. & P. 431 a £10 Bank of England note which had been cancelled in good faith was held no longer to be property. *Quaere* whether this is good law for a cancelled bill of exchange today?

[49] *Lindsay* v. *Cundy* (1876) 1 Q.B.D. 348, 358-359, *per* Blackburn J. See also *London County Justices* (1908) 72 J.P. 513.

[50] " On the restitution of any stolen property if it appears to the court by the evidence that the offender has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any moneys have been taken from the offender on his apprehension, the court may, on the application of such purchaser, order that out of such moneys a sum not exceeding the amount of the proceeds of such sale be delivered to the said purchaser."

[51] If the owner elected to have his goods back it is submitted that the third party could not then obtain a restitution order for his money, because it was not the subject-matter of the criminal charge: see footnote 43.

[52] See footnotes 25, 26, above.

592 bears on the question. Some metal had been stolen and part of it sold. On conviction the only property in court was the metal which had been sold and the money paid for it. The remainder of the metal had apparently not been traced. This consideration may have influenced the trial judge, who ordered both metal and money to be handed over to the original owner of the metal. The Supreme Court of New Brunswick set the order aside so far as it required the money to be paid over, but unfortunately no reasons were given.

This discussion has assumed so far that the proceeds are at one remove from the stolen property itself. The words " whether immediately or otherwise " in the Larceny Act, s. 46 (1), are quite wide enough to cover reconversion of the first proceeds, and so on indefinitely. As far as restitution is concerned, a limit is likely to be set to this in practice by difficulties of identification and proof.[53]

(iii) *Money*

Money is interesting as being outside the definition of " goods " in the Sale of Goods Act but inside the definition of " property " in the Larceny Act.[54] The discrepancy is an apparent one only, arising from the fact that the word " money " is used in different senses in the two statutes. In the Sale of Goods Act it refers to current coin which passes in currency. In the Larceny Act it refers to any object which serves, or has served, the purpose of money, whether it is used as current coin or not. The result is, that if money passes from a thief to an innocent third party in currency, the third party obtains a good title to it in the same way as he would to a negotiable instrument, but that if it passes to him as an item of property apart from its use as current coin, he obtains no better title to it than the general rules as to the passing of property confer upon him.

The principal case on the relation of the restitution provisions to money is *Moss* v. *Hancock* [1899] 2 Q.B. 111. A butler stole a gold £5 piece from his employer and exchanged it with a dealer for five sovereigns. The £5 piece was current coin by Royal Proclamation, but had been presented to the employer as a memento. It was found as a fact that the coin had passed from the butler to the dealer by way of sale in market overt as a curiosity and not in currency. The magistrates had convicted of larceny and made a restitution order under section 100 of the

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[53] *Cf. D'Andrea* v. *Woods* [1953] 1 W.L.R. 1307.

[54] S.G.A., s. 62 (1), expressly excludes " things in action and money." L.A., s. 46 (1), expressly includes " money."

Larceny Act, 1861, the relevant wording of which was the same as in section 45 of the present Act. The question for the Divisional Court was whether the magistrates had power to make this order. Prima facie, the point was covered by the express inclusion of money in the section, but neither Darling nor Channell JJ. would accept this at its face value. They did not think that Parliament could have intended to revest money which had passed in currency merely because it happened to be identifiable. They therefore preferred to base their decision on the fact that the £5 piece had been treated as an item of property quite apart from its function as current coin. On this ground the order was upheld. Presumably the silence of sections 45 and 46 (1) of the present Larceny Act are to be taken as tacit approval of this decision.[55]

The restitution of money is, of course, subject to identification. Even if the actual money stolen is still in the thief's possession it must be identified as such before it can be restored.[56]

(iv) *Negotiable instruments*

Both the Larceny Act, s. 45, and the Sale of Goods Act, s. 24, preserve the sanctity of negotiable instruments. The former does so by stating emphatically that " nothing in this section shall apply to " them when negotiated. Section 45 (2) (*a*) describes negotiable instruments in language which does not seem to be have been questioned since it was enacted. The word " just " might leave room for ingenious advocacy one day; and " reasonable cause " could easily give rise to dispute, but this cannot very well be avoided. Section 24 excludes negotiable instruments by virtue of the definition of " goods " in the Sale of Goods Act, s. 62 (1), as " other than things in action." [57]

Appeals

Where restitution or revesting is concerned, the Criminal Appeal Act, 1907, s. 6, applies. This enacts that the operation of such orders or of revesting shall be suspended in any case for ten days from the date of conviction, and, if notice of appeal is given during that time, until the appeal is determined, unless the court of conviction directs to the contrary because the title to the property is not in dispute. If the conviction is quashed on appeal the order or revesting does not take effect at all. Even if the conviction is not quashed, the Court of Criminal Appeal may annul or vary a restitution order (section 6 (2)). There is power to make rules of court on the subject.[58] When an appeal is taken, there are three different people to be considered: the accused, the victim, and the third party, if any.

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[55] The case could arise at the present day with sovereigns or half-sovereigns. See *Treseder-Griffin* v. *Co-op. Ins. Co., Ltd.* [1956] 2 W.L.R. 866; and *cf.* the Swiss counterfeiting case in *The Times*, April 14, 1956, p. 5.

[56] See the Canadian cases *Haverstock* (1901) 5 C.C.C. 113, and *Jackow* (1934) 1 W.W.R. 340; 42 Man.R. 121; 62 C.C.C. 277.

[57] There is therefore no longer any need to refer (as in Archbold's *Criminal Pleadings*, 33rd ed., p. 309, para. 526) to *Chichester* v. *Hill* (1882) 52 L.J.Q.B. 160; 15 Cox C.C. 258, for the proposition that negotiable instruments, when negotiated, are outside the revesting provision altogether, and not merely outside the summary power to restore.

(i) *The accused*

The accused may seek to obtain the annulment or variation of an order as part of a larger appeal against conviction, but if he wishes to appeal from the order alone he can do so as an appeal against sentence. This follows from the definition of the word "sentence" in section 21 of the Criminal Appeal Act: "The expression 'sentence' includes any order of the court made with reference to the person convicted." It seems obvious that a restitution order made against him is made with reference to the person convicted.[59] Where the accused appeals against the sentence other than the order, it seems probable that the court may annul or vary the order in the same way as on an appeal against conviction.[60]

(ii) *The victim*

There is no authority on the victim's right of appeal, if any. If the accused is acquitted, no problem arises, for a further attempt by the prosecutor to obtain an order would be in effect an appeal against the acquittal. But on conviction he may want to have the terms of the order varied or to appeal against a refusal to make an order. In these cases it seems probable that he is in the same position as the third party, who will now be considered.

(iii) *The third party*

Third parties must not be misled by the words "notice of appeal" in section 6. The appeal is that of the accused, and not of anyone else against whom an order of restitution may have been made. This was decided in *Elliott* [1908] 2 K.B. 452. A restitution order had been made against a third party on the conviction of the accused. The latter appealed and his appeal was dismissed. Thereupon the third party sought himself to appeal against the order, invoking section 6 (2). The Court of Criminal Appeal held that he could not do so. Section 6 was an enabling section which conferred certain powers upon the court but did not create any rights of appeal. Therefore, whilst the court could always of its own volition reconsider an order, the person, other than the accused, against whom it had been made had no remedy before the Court of Criminal Appeal as of right.

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[58] s. 6 (1). The relevant ones are the Criminal Appeal Rules, 1908, 9–13.

[59] In *Jones* [1929] 1 K.B. 211 it was decided, on this ground, that an appeal lay from an order of compensation under the Forfeiture Act, 1870, s. 4, as an appeal against sentence. This case was followed in Canada in *Graves and Rose* [1950] O.W.N. 238; 9 C.R. 365, where the Ontario Court of Appeal gave a reminder that normally discretionary orders will not be interfered with on appeal.

[60] In *Bowman* (1927) 20 Cr.App.R. 90, an order of compensation under the Forfeiture Act, 1870, s. 4, was set aside after an appeal against the main sentence had been allowed, but whether the court did this on its own initiative or at the instance of the accused does not appear.

Nor does an appeal lie to any other court. It has been held that an appeal from a restitution order is a "criminal cause or matter" within the Judicature Act, 1873, s. 47.[61] For this reason it cannot be taken before the Court of Appeal either.[62] This is, with respect, to pay too much attention to the outward form of things. Although it is a criminal court which makes the order, this court acts only by a special extension to it of civil jurisdiction. In the absence of a right of appeal by third parties to the Court of Criminal Appeal it is submitted that, cumbersome though double proceedings might be, there should at least be recourse to the Court of Appeal. But clearly, the most satisfactory course, if the speed and convenience of the procedure for obtaining restitution in criminal proceedings is to be maintained, would be to give third parties a right of appeal to the Court of Criminal Appeal.

At present the only remedy open to a third party seems to be certiorari, and there are a number of examples of this being pursued.[63] In this context it has been decided that mandamus will not go to the Central Criminal Court.[64]

Magistrates' Courts

The powers contained in the Larceny Act, s. 45 (2), are conferred upon courts of summary jurisdiction for the appropriate indictable offences by the Magistrates' Courts Act, 1952, s. 33. The accused's right of appeal to Quarter Sessions from a magistrates' court is now regulated by section 83 of the same Act. For the purpose of an appeal against sentence the expression "sentence" includes, with four exceptions, any order made on conviction. None of the exceptions applies to restitution orders, which, as with superior courts, may be appealed from as part of the sentence. By section 87 (1), anyone who is aggrieved by the determinations or orders of the magistrates may appeal by way of case stated to the Divisional Court. This clearly covers victims and third parties. The onus of demonstrating an error in law or an excess of jurisdiction would be considerable in the case of a discretionary order. Nevertheless, the existence of a clearly defined right of appeal such as this is a great improvement on the position in the superior courts.

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[61] *Justices of the Central Criminal Court* (1886) 18 Q.B.D. 314.

[62] Compare the position with appeals from habeas corpus proceedings: 15 *Modern Law Review* 55.

[63] *Justices of C.C.C.* (see footnote 61); *London County Justices* (1908) 72 J.P. 513; *London Corporation* (1858) E.B. & E. 509.

[64] *Justices of C.C.C.* (1883) 11 Q.B.D. 479.

Discrepancies Between Sections 24 and 45

Sections 24 of the Sale of Goods Act, 1893, and 45 of the Larceny Act, 1916, are not perfectly complementary. Section 24 applies to all convictions for larceny [65] but is limited to convictions for larceny. Section 45 applies only to offences under its own Act, but this includes crimes other than larceny. The definitions [66] of "goods" and "property" differ. In effect this difference brings about only two discrepancies between the sections: both real property and money are included in section 45 and excluded from section 24. The case of realty is of no practical importance.[67] The decision in *Moss* v. *Hancock* [1899] 2 Q.B. 111 shows the word "money" to be used in different senses in the two sections. The fact that section 24 applies to all convictions for larceny and section 45 only to those under the Act might be of importance where the conviction is under some other statute.[68] It would then mean that the prosecutor could not take advantage of the summary remedy on conviction, but would have to fall back on the civil courts. The effect of the converse difference, that section 24 is limited to convictions for larceny but section 45 is not, is that although the goods must have been stolen, the owner can benefit from revesting without the thief himself being brought to book. It is sufficient, for example, if a receiver is convicted.

Courts-Martial

Where an offender is subject to the jurisdiction of a court-martial, sections 75 of the Army Act and the Air Force Act confer upon the court powers similar to those contained in section 45 of the Larceny Act, 1916. The Courts-Martial (Appeals) Act, 1951, section 15, regulates the suspension of orders pending appeal.

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[65] It refers to "stolen" goods, but stealing is, of course, defined in s. 1 of the Larceny Act.

[66] S.G.A., s. 62 (1) and L.A., s. 46 (1).

[67] It may stem from the old larceny decisions on things appertaining to realty.

[68] *e.g.*, Larceny Act, 1861.

Pawnbrokers

The Pawnbrokers Act, 1872, s. 30, provides:

> In each of the following cases,—
>
> (1) If any person is convicted under this Act in a court of summary jurisdiction of knowingly and designedly pawning with a pawnbroker anything being the property of another person, the pawner not being employed or authorised by the owner thereof to pawn the same:
>
> (2) If any person is convicted in any court of feloniously taking or fraudulently obtaining any goods and chattels, and it appears to the court the same have been pawned with a pawnbroker:
>
> (3) If in any proceedings before a court of summary jurisdiction it appears to the court that any goods and chattels brought before the court have been unlawfully pawned with a pawnbroker:
>
> the court, on proof of the ownership of the goods and chattels, may, if it thinks fit, order the delivery thereof to the owner, either on payment to the Pawnbroker of the amount of the loan or of any part thereof, or without payment thereof or of any part thereof, as to the court, according to the conduct of the owner and the other circumstances of the case, seems just and fitting.

The Pawnbrokers Act has no application where the amount of the loan exceeds £10 (s. 10). This, taken with the paucity of decided cases on section 30, suggests that the influence of the section is slight. Pawnbrokers probably have to cope more frequently than any other section of the mercantile community with the problems arising from stolen property. Section 30 attempts to preserve the rights of the owner without overlooking the peculiar vulnerability of the pawnbroker. The owner will normally have a good action against the pawnbroker for the return of his property without any question of paying for it. Section 30 does not disturb the civil rights of the parties,[69] but tries to entice the owner into recognising the moral claim of the pawnbroker by offering him a cheap and convenient way of regaining possession in return for some compensation of the pawnbroker. Unfortunately the section amounts, as interpreted, to little more than a pious hope.

A court which convicts of certain offences is authorised to order the return to the owner of property in the hands of an innocent pawnbroker. The court has a discretion not only whether to restore but also whether to impose terms of compensation of the pawnbroker. A court of summary jurisdiction is given by subsection (3) a general power to make an order if in any proceedings at all it appears that property has been unlawfully pawned. This makes subsection (2) superfluous as far as summary courts are concerned, and subsection (1) superfluous altogether.[70] For other courts, subsection (2) extends the section, for no apparent reason, only to cases of larceny and obtaining. Nothing in section 30 requires application to be made before the court can exercise jurisdiction.[71] The meaning to be attached to the word " owner " in this part of the law has already been noticed.[72] As to the persons against whom an order may be made, section 30 obviously contemplates that the property is still in the hands of the pawnbroker. Those with a taste for the literal, however, may observe that it does not actually say so. A grammatically possible interpretation is that power to make an order exists if at any time since the offence the property has passed through the hands of a pawnbroker. There is no definition of " goods and chattels " in the Act. In view of the term " property " which is also used, it probably covers any personal property capable of being pawned.

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[69] *Leicester* v. *Cherryman* [1907] 2 K.B. 101.

If there were no other way in which the rival claims of owner and pawnbroker could be settled, section 30 would appear as a sensible effort to deal with a situation where someone must almost certainly lose, for the court is directed to take all the circumstances of the case into account. The door was closed on this possibility in *Leicester* v. *Cherryman* [1907] 2 K.B. 101.[73] In this case an order under section 30 had been made on the application of the police. The owners of the property neither supported nor opposed the application at the time, and thereafter they simply ignored the order. In due course, instead of regaining their property by obeying the terms of the order, they brought this action against the pawnbrokers for its return. The defence was that, an order having been made, the action was barred. This argument failed. Ridley J. (Bray J. agreeing) expressed the view that none of the Acts dealing with the restitution of property was intended to affect the civil rights of the parties, but only to provide a convenient summary remedy for the encouragement of prosecutors. He thought that if

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[70] The poor drafting of this section reaches its nadir in the last fifteen words of subsection (1), which are pure verbiage.

[71] Unless " on proof of ownership " be thought to imply this.

[72] See p. 378, above.

[73] Quoted with approval in the New Zealand case of *Mailer* [1922] N.Z.L.R. 288; G.L.R. 104.

Parliament had intended the civil remedy to be affected it would have said so. In his opinion also, no question of estoppel could arise, particularly in a case like the present where the plaintiffs had neither applied for the order nor consented to it.

It is submitted that the generalisation about the intention of the Acts on restitution was too wide. In the case of the Larceny Act, 1916, s. 45, it may be true. But section 30 differs from section 45 in a material particular: it is clearly intended to give the court a discretion to protect the third party, wholly or in part, at the expense of the prosecutor. Therefore an order under the section should not simply be equated to civil judgment. In an action, if the plaintiff is entitled to judgment he gets it without any reservations about whether the defendant deserves on the whole to be compensated. Therefore different arguments should apply in considering the effect of an order. However, *Leicester* v. *Cherryman* has remained unchallenged for fifty years and must be accepted as having settled the effect of an order under section 30. An owner who dislikes the terms of his order may ignore it.

It was also said in *Leicester* v. *Cherryman* (at p. 103) to have been the practice "not to make an order of restitution in a case where the circumstances require that there should be terms imposed unless the prosecutor consents to compensate the person who has possession of stolen property." Clearly, there would be no point in imposing terms against the owner's will unless the court were in a position to enforce their acceptance. In a case on a similar Scottish statute [74] Lord Cooper characterised the position which arises when it is desired to order restitution on terms in this fashion: "In effect what the magistrate said . . . to the owner of the coat was—'You may have immediate delivery of the coat, which is at present constructively in the possession of the pawnbroker in good faith, provided you pay him £4 10s.,' and impliedly the order adds 'But if you don't want to take immediate possession you need not take it and you need not pay the £4 10s.; you may take such other civil remedies as may be open to you.'" This is exactly the situation which occurs when an order on terms is made under section 30.

Quite how the power to restore on terms in larceny cases is reconciled with the revesting law of the Sale of Goods Act, 1893, s. 24, is not clear. The answer is probably that in the case of any conflict the latter takes precedence.

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[74] *Robertson* v. *Burns* (1942) 6 *Journal of Criminal Law* 297.

An Australian Letter

From Norval Morris
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Issue Estoppel

A year's teaching in the United States of America has accustomed your correspondent to the leisurely and protracted litigation of criminal issues through a multiplicity of courts—State and Federal. Nevertheless, it was with some surprise, upon returning to Australia, that he made the discovery that six Australian trial and appellate courts had recently considered the legal issues arising from one fairly simple fact situation. In New South Wales, a Miss Wilson died during or immediately after sexual intercourse with one Mraz. Apparently she died of shock, there being no injuries to her body which could sufficiently account for her death. Mraz was charged with murder, the Crown alleging that the death had occurred during or immediately after the commission of the felony of rape by him, the death thus falling within the terms of section 18 (1) (*a*) of the Crimes Act, 1900–1955: "Murder shall be taken to have been committed where the act of the accused, . . . causing the death charged, was done . . . during or immediately after the commission, by the accused, . . . of a crime punishable by death or penal servitude for life." For Mraz it was argued that Miss Wilson was an entirely willing and consenting party to the intercourse, and that her death should be regarded as death by misadventure.

The issue of consent or no consent was thus clearly joined between the Crown and Mraz—in itself a difficult enough problem for the jury without the superaddition of any unnecessary legal complexity. However, the trial judge was misled by subsection 2 (*a*) of section 18 of the same Act, which reads: "No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section." He directed the jury that a rape could either be malicious or non-malicious, and referred to other sections of the Crimes Act to define "malicious." He charged them that, if they determined that Miss Wilson had died from an act committed by Mraz during or immediately after the commission of the felony of rape against her, they should convict Mraz of murder only if they found that he had committed a "malicious rape"; but if they determined that the rape was not "malicious," they should acquit him of murder and convict him of manslaughter. It would appear that the distinction the trial judge sought to draw between a malicious and a non-malicious rape turned on whether the accused intended to rape her for the sake of inflicting injury on her, or whether he intended to rape her merely for the gratification of his own lust. The Chief Justice of the High Court of Australia, Sir Owen Dixon, later described this distinction as "somewhat curious . . . a curious conception." So directed, the jury acquitted Mraz of the murder and convicted him of the manslaughter of Miss Wilson. He was sentenced to imprisonment for twelve years.

Mraz appealed from this conviction and sentence to the Court of Criminal Appeal of New South Wales. The court held that the directions given were erroneous but took the view that there had been no miscarriage of justice and therefore dismissed the appeal pursuant to the proviso to section 6 (1) of the New South Wales Criminal Appeal Act of 1912, which is similar to the proviso to section 4 (1) of the English Criminal Appeal Act, 1907, allowing the court to dismiss an appeal if it considers that "no substantial miscarriage of justice" has actually occurred. The effect of the misdirection, it was held, was that the appellant had escaped more lightly than otherwise he might.

Leave to appeal to the High Court of Australia was sought and granted, and the verdict of manslaughter quashed by that court ((1955) 93 *Commonwealth Law Reports* 493). As Fullagar J. said (at p. 514): "These 'too favourable' directions can only too often be veritable gifts from the Greeks." The effect of the misdirection by the trial judge was to increase the likelihood of a verdict of manslaughter (which, in any event, was open to the jury), and to minimise the chances *both* of a conviction of murder and of an acquittal of murder. Mraz had thus lost something of his right to justice according to law by this misdirection. Certainly the Crown could not show, as they must in these circumstances to avoid a quashing of the conviction, that there was no real possibility of justice miscarrying. There is power in the High Court to order a retrial; this could only be in respect of a charge of manslaughter, for Mraz had already been acquitted of the murder. As it was agreed that an indictment for manslaughter would be entirely improper, Mraz's conviction of manslaughter was quashed and no retrial was ordered.

Proceedings for rape

Now the real complexities of the story begin. Eager in their pursuit, the authorities in the State of New South Wales charged Mraz with the offence of rape. His somewhat ineffectually drawn case that he had already been acquitted of this offence at the first trial was rejected, and on his trial for rape a conviction was recorded. His appeal to the Court of Criminal Appeal in New South Wales was dismissed. Then he reached his sixth court, again the High Court of Australia, and here he succeeded on a technical and unusual point in the criminal law—an issue estoppel. The judgment of the High Court, delivered by the Chief Justice, Sir Owen Dixon, is brief but packed with precise analysis ([1956] *Argus Law Reports* 999). The Chief Justice applied and developed an interpretation of the doctrine of issue estoppel in criminal law which he had advanced previously in the case of *The King* v. *Wilkes*, where he said ((1948) 77 *Commonwealth Law Reports* 511 at 518): " Whilst there is not a great deal of authority upon the subject, it appears to me that there is nothing wrong in the view that there is an issue estoppel, if it appears by record of itself or as explained by proper evidence, that the same point was determined in favour of a prisoner in a previous criminal trial which is brought in issue on a second criminal trial of the same prisoner. . . . There must be a prior proceeding determined against the Crown necessarily involving an issue which again arises in a subsequent proceeding by the Crown against the same prisoner. The allegation of the Crown in the subsequent proceeding must itself be inconsistent with the acquittal of the prisoner in the previous proceeding. But if such a condition of affairs arises I see no reason why the ordinary rules of issue estoppel should not apply. Such rules are not to be confused with those of *res judicata*, which in criminal proceedings are expressed in the pleas of *autrefois acquit* and *autrefois convict*." He was buttressed in his analysis by the decision of the Privy Council in *Sambasivam* v. *Public Prosecutor, Federation of Malaya*, where the Board held ([1950] A.C. 458, at 479) that " the effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings."

How, then, did this doctrine of issue estoppel apply to Mraz? To convict Mraz of murder at the first trial it was necessary for the Crown to show three things:—

(1) that he committed rape upon Miss Wilson ; and
(2) that during or immediately after that offence he did an act,
(3) which act caused her death.

All three being proved, the offence is murder. If one or more of these essential elements is absent, he has not committed murder. For Mraz's acquittal of murder to function as an issue estoppel in a subsequent trial of rape the burden lies upon him to establish that the first stated element—that he committed rape—was found to be lacking by the court which tried him for murder. Here, in brief, is the reasoning which the High Court relied on to establish this issue estoppel. Element three was found to be *present* by the jury because they convicted him of manslaughter. Element two can be disposed of as having also been found in the affirmative, because, in the Chief Justice's words, " there was neither contest nor doubt at the trial upon this latter issue." Therefore, as a matter of logical analysis, in acquitting Mraz of murder the jury determined an issue joined between him and the Crown in his favour, and that issue was whether his admitted intercourse with Miss Wilson was or was not to be classed as the offence of rape. They must, therefore, be held to have determined that it was not.

Now the truth is, of course, that one cannot with confidence determine *what* was in the jury's mind. The verdict of manslaughter may well have been merely a compromise verdict. More likely it was a verdict based carefully on the misdirection of the trial judge, the jury deciding that Mraz's offence against Miss Wilson was a rape but was not, in the terms in which they had been directed, a " malicious rape."

Though this may well have been what happened at the trial, the Chief Justice nevertheless held that Mraz was entitled to rely upon the issue estoppel " because when he pleaded not guilty to the indictment of murder the issues which were thereby joined between him and the Crown necessarily raised for determination the existence of the three elements we have mentioned and the verdict upon those issues must, for the reasons we have given, be taken to have affirmed the existence of the third and to have denied the existence of one or other of the other two elements. It is nothing to the point that the verdict may have been the result of a misdirection of the judge, and that owing to the misdirection the jury may have found the verdict without understanding or intending what as a matter of law is its necessary meaning or its legal consequences. The law which gives effect to issue estoppel is not concerned with the correctness or incorrectness of the finding which amounts to an estoppel, still less with the processes of reasoning by which the finding was reached in fact; it does not matter that the finding may be thought to be due to the jury having been put on the wrong track by some direction of the presiding judge or to the jury having got on to the wrong track unaided. It is enough that an issue or issues have been distinctly raised and found. Once that is done, then, so long as the finding stands, if there be any subsequent litigation between the parties, no allegations legally inconsistent with the finding may be made by one of them against the other" ([1956] *Argus Law Reports* 999, at 1001).

One difficulty in applying the doctrine of issue estoppel in criminal proceedings is the relatively limited extent of the record in them, as contrasted with civil proceedings, where written pleadings form part of the record and help to define more precisely the issues joined.

In criminal law, particularly, we are chary of fictions. In *Mraz* it would appear that something like a fiction determined the result, for it seems reasonably clear that, whatever the processes of logical analysis brought to bear on their verdict, the jury did not in fact find "no rape." It is true that the rape or no rape issue was squarely joined between the Crown and the accused; but it was confused by other aspects of the trial. To establish an issue estoppel, the accused was allowed to go behind the record to show the absence of another possible ground for the jury's verdict—that it was not an act of his, other than during or immediately after rape or intercourse, that killed Miss Wilson (it must have been *his* act, because of the manslaughter verdict, but an act at a different *time* could sustain the jury's finding on the record). If the accused, though bearing the burden of proof on the estoppel plea, is not confined to the record, why should the Crown not be allowed to seek to rebut this evidence *aliunde* by relying on the misdirection which can explain the verdict without setting up the estoppel? Why cannot it, too, go behind the record?

This contention overlooks the very real differences between what Mraz's counsel was allowed to do to set up the estoppel and what the Crown was denied when seeking to rebut it. For Mraz, evidence could be given *aliunde* to define the issues joined at the first trial; for the Crown, the evidence refused went not to a definition of the issues joined, but to an allegation that the issues were ineffectually determined. But it is the effective joinder of the issue, not the efficiency of its determination, that sets up the estoppel.

A reading of the High Court's two judgments in this case—when the conviction of manslaughter was quashed and when the doctrine of issue estoppel was held to preclude an indictment for rape—leads one to think that it was not only upon a technicality, precisely analysed, that the court reached its decisions; for at least one member of the court also indicated his very real doubt whether the question of rape, and therefore of murder, should ever have been allowed to go to the jury. Mraz was aged twenty-two, Miss Wilson thirty; there were no real signs of a struggle; his inculpatory statements to the police were far from determinative; and, all in all, it appears from the judgments that several members of the High Court would not regard the eventual result of the six cases—the complete exculpation of Mraz—as in any way a miscarriage of justice. Be that as it may, there emerged from these six hearings an extremely useful analysis on a rarely litigated technical procedural problem in criminal law, and, as Coleridge J. suggested (*The Queen* v. *Hartington Middle Quarter* (1845) 4 El. & Bl. 780, 793), even though the doctrine of issue estoppel "may seem to produce injustice in the particular instance, as all estoppels are liable to do, yet in the long run the ends of equity and strict justice both are best served by holding strictly to the rule."

Alternative Verdicts

In Queensland, a somewhat similar doctrine to *Mraz* exculpated one Redgard. Redgard was charged with rape. His defence was that the woman had consented. She gave evidence that immediately prior to the act of intercourse Redgard had, without her consent, interfered with her underclothing. The trial judge directed the jury that it was open to them, on this charge, to find Redgard guilty of unlawful and indecent assault; but also urged them that in common sense the real issue before them was consent or no consent, and that they would be wise to confine themselves to the rape charge. His direction that the indecent assault verdict was open to the jury was based on section 578 of the Queensland Criminal Code which provides that "upon an indictment charging a person with the crime of rape . . . he may be convicted of . . . unlawfully and indecently assaulting the woman or girl . . . if any such offence is established by the evidence." Presumably the Code here contemplated a situation where another element of the crime of rape, for example, penetration, was in doubt; where the issue is consent or no consent to the rape one would imagine that that also determined the consent issue for the purposes of any immediately related assault. That the jury should overlook this practical identity between the two offences, in these circumstances, in favour of a compromise verdict, is, of course, not at all unlikely.

In the upshot, the jury convicted Redgard of the unlawful and indecent assault and acquitted him of rape.

Redgard appealed successfully to the Court of Criminal Appeal (*R.* v. *Redgard* [1956] State Reports Queensland 1). The Crown resisted his appeal on the ground, *inter alia,* that the verdict was not an illogical compromise but was based on the proposition that the jury " had doubt as to the girl's consent to intercourse but no doubt as to her non-consent to the indecent assault " ; that

> " A little still she strove and much repented,
> And whispering ' I will ne'er consent ' consented " ;

and that in fact she may well have not consented to the preliminary assault but later, weakening, may have consented to intercourse.

The court were agreed in rejecting this argument. Philp J. expressed difficulty in putting the matter in legal parlance, but succeeded in doing so with delicacy and wit (*ibid.* p. 6): " Strictly, particularly in criminal matters (in which the public interest is paramount), there can be no retroactive consent so that one cannot, as it were, apply *The Six Carpenters Case* ((1610) 8 Co.Rep. 146a) in reverse and hold that consent to the intercourse makes the unconsented-to preliminary act no trespass ; but I think that where the preliminary acts and intercourse are so connected as to form one transaction then the jury should be directed that they should not separately regard each part of the transaction but should regard the transaction as a whole and see if it was, as a matter of practical reality, consented to."

Filling a Gap in the Law of Larceny

Here was the gap. Sykes approaches Ingenuous and says: " I can supply you with a most modern washing machine at a figure well under the usual wholesale price. Please don't ask me too many questions about it." Ingenuous says: " Certainly, thank you very much." Sykes, of course, takes a £10 deposit to confirm the contract—and is seen no more. Until the recent decision in England of *R.* v. *Ingram* [1956] Crim.L.R. 56 and until recent legislation in New South Wales and Victoria, Ingenuous was left to comfort himself with his civil remedy against Sykes ; and Sykes was not a criminal. He had made no false pretence as to an existing fact, a false representation as to a presently existing intention having been frequently held insufficient for a conviction of obtaining by false pretences. He had taken the £10 with the consent of the owner who intended to part with his property in it, subject to certain contractual rights against Sykes, and there was therefore no larceny by a trick. He had not obtained "credit" within the pre-1956 interpretation of section 13 (1) of the English Debtors Act, 1869, or similar Australian legislation.

But by 1956 all this is changed: the gap is filled. In England it is filled to a degree by the decision of the Court of Criminal Appeal in *Ingram*, in which the words "obtaining credit" in section 13 (1) of the Debtors Act, 1869, were reinterpreted (see, if the use of "reinterpreted" is objected to, *R.* v. *Dent* [1955] Crim.L.R. 501) to include the incurring of a liability to pay, not only money, but money's worth—in the particular case, services; and presumably a fraudulent promise to supply goods would suffice.

The New South Wales and Victorian legislation to fill this gap proceeded by modifying not the offence of obtaining credit by fraud but that of obtaining by false pretences. The New South Wales' Crimes Act, 1900–1955 (section 179) provides:

> "whosoever, by any false pretence or by any wilfully false promise, or partly by a false pretence and partly by a wilfully false promise, obtains from any person any property, with intent to defraud, shall be liable to penal servitude for five years."

The Victorian Crimes Act, 1954, follows the New South Wales pattern in this respect but also, *ex abundanti cautela,* reaffirms that it is also an offence to obtain credit by any wilfully false promise.

It is strange that England, the home of *stare decisis* and an omnicompetent legislature, should proceed by judicial reformulation while Australian states, with legislatures of limited competence and judges who feel possibly slightly freer than their English brothers within the helpful bonds of precedent, should proceed by way of legislation.

Only time will test the relative wisdom of the two stop-gaps. In both there are difficulties. Will the English "obtaining credit by fraud" solution tend to bring the juggernaut of the criminal law down on the butterflies of dilatory debtors? Can it impinge at all on the villain who, being unmarried, wilfully falsely promises to marry his innocent inamorata, thus acquiring generous financial assistance prior to the never-eventuating ceremony?—surely not. And there may be other problems. Likewise, the Australian "obtaining property by wilfully false promises" solution has its difficulties, though it solves the problem of our fraudulent suitor. May it fall too heavily on business men who make promises, hoping against declining hope that they may be able to fulfil them, but in their more honest moments perceptive of their impending bankruptcy?

On October 29, 1956, in *The Queen* v. *Harrison* [1957] *Argus Law Reports* 93, the Victorian Court of Criminal Appeal (Gavan Duffy, Barry and Monahan JJ.) handed down their judgment in the first case calling for an appellate court's consideration of the Victorian legislation. Barry J. analysed the concept of a " wilfully false promise " as follows:

> " A promise which is meant to and does create the impression that the promisor intends that the promise shall be performed by him is deceitful if in fact he has not that intention at the time of the promise. He may lack that intention because he has decided not to perform it, or because he does not believe, at the time when he makes the promise, that he will be able to perform it. In either case the promise is wilfully false. The mere fact that the promise was not performed does not justify the inference that the promisor did not have the intention that it should be performed ; that conclusion is one of fact, and whether or not it should be drawn must depend on the evidence in each case. If the promise was made in reckless disregard of the likelihood of the promisor's being able to keep it, that circumstance may justify a conclusion that he did not have the intention to do so, but again that is an inference of fact and whether it should be drawn must be determined in the light of the evidence in each case."

It is submitted that there is little to choose between the English and Australian solutions of this problem. The Australian is perhaps less strained and possibly may trap more rogues ; both risk the impingement of the sanctions of the criminal law on the merely foolish, foolhardy, or over-confident. But in practice, by either method, the good sense of judges and juries should enable a satisfactory weeding of the rogues from amongst the hopeful puffers.

Capital Punishment

On April 14, 1955, the New South Wales Crimes (Amendment) Act, 1955, received the Royal Assent. Section 5 of that Act, without reservation, abolishes capital punishment for murder in New South Wales. Two states of Australia are now abolitionist—Queensland, since 1922 (no execution since 1913), and New South Wales, 1955 (no execution since 1939). The other four states of the Commonwealth are in theory hanging states, but in practice executions are a rarity, the last one being in 1953. The situation in these other States is somewhat extraordinary—execution or commutation to protracted imprisonment depends partly on the disposition of party political power for the time being, the Labour party being abolitionist, the Liberal and Country parties in favour of hanging in appropriate (extremely shocking?) cases. Few citizens so carefully study the political scene in Australia as condemned murderers in these states. There is, of course, nothing whatsoever to recommend this practice.

The Australian states seem steadily to be moving towards abolition, without any increase in the murder or attempted murder rates, and without any higher such rates in the abolitionist than in the non-abolitionist states.

Practice and Procedure

Quarter Sessions

Sending committal order to Court of Criminal Appeal

After delivering the judgment of the Court of Criminal Appeal in *R.* v. *Perfect* on April 15, 1957 (see p. 407, below), the Lord Chief Justice said that it was desired to add for the guidance of clerks of the peace that it would be convenient, when there is an appeal to the Court of Criminal Appeal against sentence in a case where the appellant was convicted at a magistrates' court and committed to sessions for sentence, that the committal order with the sentence endorsed thereon be sent to the Court of Criminal Appeal. It could then be rectified if the sentence were altered, just as was done with an indictment. [H. P.]

Magistrates' Courts

Restrictions on the power to order detention for one day

There are a number of instances where a difference in the wording of the Magistrates' Courts Act, 1952, as compared with that of a corresponding part of the old summary jurisdiction law has led to a change in magistrates' powers, which almost seems to have been unintentional because there had been no call for that particular alteration. Such amendments in the law are apt to be troublesome to practitioners as it is not easily ascertainable that they have been made, but yet their results may be extremely important in the sense that continuance of practices which were lawful formerly may now involve justices in actions for damages. An example is the power to order a person to be detained within the precincts of a magistrates' court or at a police station, instead of being committed to prison. By section 12 of the Criminal

Justice Administration Act, 1914, this was expressed to be exercisable " where a court of summary jurisdiction has power to pass a sentence of imprisonment " ; and by section 41 (1) of that Act " the expression ' sentenced to imprisonment ' shall include cases where imprisonment is imposed by a court on any person . . . in respect of the non-payment of any sum of money, or for failing to do or abstaining from doing any act or thing required to be done or left undone, and the expression ' sentence of imprisonment ' shall be construed accordingly." The combined effect of these enactments was that one day's detention could be ordered in default of paying a sum due as a civil debt, or for rates or under an order for the periodical payment of money ; and it could also be ordered if there had been disobedience of a summary order otherwise than for the payment of money.

The Magistrates' Courts Act, 1952, repealed these provisions, and by section 110 replaced them with these words: " A magistrates' court that has power to commit to prison a person convicted of an offence . . . may order him to be detained, etc." Section 128 specifically states that " committal of persons for want of sufficient distress to satisfy a rate shall not be subject to the provisions of this Act." But, even without this, it is clear from the terms of section 110 that a rate defaulter can no longer be detained one day, because he is not a person who has been convicted of an offence. For the same reason, this mitigated punishment has ceased to be available to meet failure to pay a civil debt or arrears under a maintenance order ; and it cannot be ordered either in the case of disobedience of other kinds of summary orders. There may not be many occasions when a court will wish to impose a " one day sentence " otherwise than on conviction, but this makes it all the more likely that justices will exceed their jurisdiction when the occasion does arise, because the change made in their powers by the Act of 1952 will not come so readily to mind.

[A. E. JONES.]

Summary Justice*

Assault

Mother assaulting schoolteacher in front of classroom of girls ; fined £2 ; Evans: Birmingham Magistrates' Court (*Birmingham Mail*, April 12).

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* At the request of a police officer who is a subscriber to this *Review*, the statutory provisions, if any, under which charges were preferred are included in the notes under this heading.

Customs and excise

Diamonds. Attempting to export £9,000 of industrial diamonds; fine reduced from £5,000 to £300; sentence of six months' imprisonment unchanged; Marcovitch: Dover Quarter Sessions (*The Times*, April 18).

Dentist

Practising dentistry while being a person not registered in the dentists' register, contrary to the Dentists Act, 1956, s. 23; fined £9; Smith: Swindon Magistrates' Court (*The Manchester Guardian*, April 5).

False pretences

Obtaining food by false pretences from hospital. Man smeared coal dust and blood on his face and pretended that he had been involved in a colliery accident, thus gaining admission to hospital; admitted similar offences; six months' imprisonment; McLeod: Doncaster Magistrates' Court (*The Manchester Guardian*, April 10).

Food and drugs

Hygiene. Allowing fish to be placed uncovered in shop in Coventry so as to involve risk of contamination, contrary to the Food Hygiene Regulations, 1955; fined £1 on each of eight summonses; MacFisheries (Wholesale and Retail), Ltd.: Coventry Magistrates' Court (*The Manchester Guardian*, April 18).

Fraud

Failing to pay bus fares on six occasions; fined £3; Skellard: Liverpool Stipendiary Magistrates' Court (*Liverpool Echo*, April 10).

Impersonation

Impersonating a police officer, contrary to the Town Police Clauses Act, 1847, s. 12. Wearing dark suit, blue shirt, black tie and shoes and carrying rubber-covered torch, he stopped two youths at night and, representing that he was a police officer, obtained their names and addresses; previous conviction for a similar offence; fined £5 and ordered to pay £1 7s. 3d. costs; Grimes: Birmingham Magistrates' Court (*Birmingham Mail*, April 10).

Intoxicating liquor

Drunk in charge of child under seven years of age, contrary to section 2 of the Licensing Act, 1902; fined £2; Mountain: Huddersfield West Riding Magistrates' Court (*Wakefield Express*, April 6).

Larceny

Three schoolboys charged with stealing police "blue lamp" globe, road signs and Belisha beacon bowls; two fined £10, one fined £5; Yardley, Southgate, Green: Brentwood Magistrates' Court (*Evening Standard*, April 10).

Petrol

Supplying 2,000 gallons of petrol without coupons on Sunday, March 10, contrary to the Motor Fuel (No. 2) Order, 1956; fined £60; Welt: West London Magistrates' Court (*The Times*, April 15).

Post office

Sending offensive letters, contrary to the Post Office Act, 1953, s. 11 (1) (*c*), to bereaved mothers and mothers who had given birth to twins or triplets; the letters had been sent to people all over the country in the course of the last five years; fined £40, bound over to keep the peace on his own recognisance of £100 and that of a surety in a similar amount; Clark: Sevenoaks Magistrates' Court (*Evening Standard*, April 26).

Public health

Smoke. Two defendants, trading as firm of metal manufacturers, failing to comply on two days with a smoke abatement notice made by the city magistrates, contrary to the Public Health Act, 1936, s. 103; each fined £6; Brookes, Brookes; Birmingham City Magistrates' Court (*Birmingham Mail*, April 5).

Road traffic

Being in charge of a car while unfit to drive, contrary to the Road Traffic Act, 1956, s. 9; fined £15, ordered to pay £4 4s. costs; Vincent: West London Magistrates' Court (*Evening Standard*, April 6).

Sale and trade

Selling a carpet to which a false trade description was applied, contrary to section 2 of the Merchandise Marks Act, 1887; carpet found to be approximately 1½ ins. by 16½ ins less than purchaser had been told by shop assistant; fined £10; Home & Fashion Store, Ltd.: Coventry Magistrates' Court (*Birmingham Mail*, April 11).

Vagrancy

Fortune telling. Pretending to tell fortunes, contrary to the Vagrancy Act, 1824, s. 4; fined £4, ordered to pay 20s. costs; George: Birmingham Stipendiary Magistrates' Court (*Birmingham Mail*, April 26).

Case and Comment*

Contempt—*Committal to prison—breach of order restraining husband from molesting wife*

MOORE *v.* MOORE [1] (P.D.A. Division: Sachs J.: April 10, 1957) (*The Times*, April 11, 1956).

A wife left her husband in 1955 and in 1956 an order was made restraining the husband from molesting or interfering with her pending matrimonial proceedings. The wife now complained that on three occasions the husband had broken the order—twice he had waited outside her house during the hours of darkness, and on a third occasion he had struck her while she was walking with a friend. The husband said that he would not contest the facts stated by the wife, but would apologise for the breaches of the injunction.

Held, that it was clear that the husband regarded the proceedings as a nuisance, and he would be committed to prison for contempt, with leave to apply after a week with a view to purging his contempt. [J. D. P.]

COMMENTARY. An affidavit in which the husband apologised was read to Sachs J. on April 11, but his Lordship said that he regarded it as very unsatisfactory. If the husband filed "a much more unqualified apology" by 3 p.m. on April 12 the order would be discharged as from 9 a.m. on April 13; otherwise he would not be released before April 17. (*The Times*, April 12, 1957.)

Food and Drugs—*Milk not of the substance demanded—milk bottle cap in milk*

EDWARDS *v.* LLAETHDY MEIRION [2] (Q.B. Divisional Court: Lord Goddard C.J., Cassels and Lynskey JJ.: January 25, 1957) (107 L.J. 138).

A company sold a bottle of milk which contained a milk bottle cap in the milk. On an information by an inspector under section 2 of the Food and Drugs Act, 1955, the justices, finding that the cap was sterile and harmless and had not affected the substance of the milk, dismissed the charge. On appeal:—

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* Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab.), Barrister-at-Law.

[1] For the wife: *E. B. McLennan* (instructed by Amphlett & Co. for Donnelly & Elliott, Gosport). The husband appeared in person.

[2] For the prosecutor: *P. J. M. Thomas* (instructed by Gush, Phillips, Walters & Williams for D. W. Jones-Williams, Dolgelley). For the defendants: *C. Lawson* (instructed by Eric P. H. Hanney).

Held, dismissing the appeal, that the mere presence of a foreign body in the milk did not, *ipso facto*, create an offence under section 2; it only became an offence if the nature, substance or quality of the milk was thereby altered, and this was a question of fact for the justices. [J. D. P.]

COMMENTARY. Section 2 makes it an offence to sell food which "is not of the nature, or not of the substance, or not of the quality . . . demanded by the purchaser." It has been held that these words create three distinct offences: *Bastin* v. *Davies* [1950] 2 K.B. 579. It is obvious that an offence under one of these heads may be made out by showing that there is a foreign body in the article sold, for section 3 provides (subsection (3)) that it shall be a defence to a charge under section 2 for the defendant to prove that the presence of extraneous matter was an unavoidable consequence of the process of collection or preparation: *J. Miller, Ltd.* v. *Battersea Borough Council* [1955] Crim. L.R. 779; and see "Fit for Human Consumption" [1956] Crim.L.R. 101.

It seems that an offence under the section may sometimes be made out, notwithstanding that the substance of the article is not affected; thus in *Lindley* v. *George W. Horner, Ltd.* (1950) 66 T.L.R. (Pt. 1) 296 the respondents, manufacturers of sweets, were held guilty of an offence under section 2 (apparently under the "quality" provision) where a toffee which they had sold contained a nail. Presumably the substance of the toffee was unimpaired. The present case seems to be distinguishable on the ground that the bottle cap was harmless, whereas the nail was potentially very dangerous.

Habeas Corpus—*Girl committed to certified institution while on remand until an approved school could be found.* See R. v. RAMPTON INSTITUTION BOARD OF CONTROL, *ex p.* BARKER, below.

Magistrates—*Jurisdiction—committal to certified institution of girl remanded until approved school found*

R. *v.* RAMPTON INSTITUTION BOARD OF CONTROL, *ex p.* BARKER[3] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Stable JJ.: April 9, 1957).

In June, 1938, H., a girl of sixteen, was brought before justices for breach of her recognisances, having previously been bound over for larceny. On July 4, 1938, she was remanded to a remand home until an approved school was found. On September 19, 1938, an application was made to the justices to commit her to a certified institution under the Mental Deficiency Act, 1913, and the justices made an order. On an application for a writ of habeas corpus on the ground that H. had been illegally detained in the institution:—

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[3] For the applicant: *John Platts-Mills* (instructed by Robert K. George). For the Board of Control: *Rodger Winn* (instructed by Solicitor, Ministry of Health).

Held, allowing the application, that by making the order for committal to an approved school and exercising the power to remand until the order could take effect, the justices had exhausted their jurisdiction over H. on her conviction for larceny, therefore they had no jurisdiction to make the order of September 19.

Per curiam: The application for a transfer from the approved school to an institution should have been made to the Secretary of State under section 9 of the Mental Deficiency Act, 1913. [J. D. P.]

COMMENTARY. The applicant had remained illegally detained for 18 years because during the whole of that time neither her parents nor anyone else had challenged the validity of her committal to the certified institution. The court emphasised that it was not deciding that the applicant was not a mental defective who might properly have been certified and placed in an institution.

Mens Rea—*Causing death by dangerous driving.* See R. *v.* SCATES, p. 406, below.

Mental Deficiency—*Magistrates' jurisdiction to commit to certified institution—transfer from approved school to institution.* See R. *v.* RAMPTON INSTITUTION, BOARD OF CONTROL, *ex p.* BARKER, p. 403, above.

Merchandise Marks—*False trade description—certificate that goods of United Kingdom origin*

R. *v.* REISS & JOHN M. POTTER, LTD. (Leeds Assizes: Barry J.: December 10, 1956) ([1957] *Journal of Business Law* 147).

The accused, who pleaded guilty, were charged with applying a false trade description to goods, contrary to section 2 (1) (*f*) and (*d*) of the Merchandise Acts, 1887 to 1953. The facts were as follows: Potter, Ltd., had purchased specified quantities of wool tops in Uruguay and resold them to customers in Italy and Greece. These countries restricted the imports of wool tops from Uruguay, but not from the United Kingdom. In order to evade the import restrictions, Potter, Ltd., with the connivance of their customers, obtained documents from the Bradford Chamber of Commerce certifying that the wool tops were of United Kingdom origin, production or manufacture. They obtained these certificates by completing the usual application forms, which were signed on behalf of the company and were submitted to the Chamber of Commerce, which in good faith attached its seal to them. Later, the officials of the chamber became suspicious and inspected the goods, which they ascertained had never entered the United Kingdom. The value of the goods in question was nearly one-third of a million pounds, giving an estimated profit of £30,000.

Barry J. fined the managing director £1,000 and the company £4,000. He said that while the customers of the accused were in no way deceived, there was a clear breach of law; it would not help the national economy if he imposed a fine which would permanently put the company out of business, but it must be made clear that it was a serious matter to deceive those responsible for issuing documents of this type used in international trade.

COMMENTARY. It is provided by section 3 of the Merchandise Marks Act, 1887, that the expression " trade description " means, *inter alia,* any statement as to the place or country in which any goods were made or produced. The point of interest in the present case is that the goods to which the false description was applied were never in England. It is, of course, a fundamental principle that the English courts do not assume jurisdiction over offences committed abroad except in cases (such as bigamy and murder) where there is a statutory provision. The case does not seem to conflict in any way with this principle; the description was unquestionably " applied " in England.

Probation—*Sentence passed for breach of probation order.* See R. *v.* PERFECT, p. 407, below.

Prostitution—*Living on the earnings of prostitution—room let to prostitute*

R. *v.* THOMAS [4–5] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Stable JJ.: April 1, 1957) ([1957] 2 All E.R. 181).

T. was convicted of living on the immoral earnings of a prostitute ([1957] Crim.L.R. 255). The evidence at the trial was that T. had allowed a prostitute to have the use of his bedroom for payment. The jury were directed that if T. was receiving payment of

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[4–5] The applicant did not appear and was not represented. The Crown was not represented.

£3 a night and allowed the prostitute to have the use of his bedroom for the purposes of carrying on her trade of prostitution in his room, he was living on the immoral earnings of that prostitute. On application for leave to appeal:—

Held, dismissing the application, that the direction to the jury was right, and that the observations in *R.* v. *Silver* (1956) 40 Cr.App.R. 32, so far as they conflict with that direction, were wrong. It was a perfectly plain case and there was no question that T. was living on immoral earnings. [H. P.]

COMMENTARY. See the commentary on Pilcher J.'s direction: [1957] Crim.L.R. 255.

Road Traffic—*Causing death by dangerous driving—mens rea*

R. *v.* SCATES [6] (Central Criminal Court: McNair J.: April 9, 10, 1957).

The accused was charged with causing death by dangerous driving, contrary to the Road Traffic Act, 1956, s. 8. S. was driving his motor vehicle when he struck K., who was on a pedestrian crossing, near the refuge centre. The prosecution said the jury must decide as a matter of fact whether there was any dangerous driving, and whether it caused death; the mental element was irrelevant, and the question of recklessness did not fall to be considered. The defence contended that it was necessary to prove some degree of *mens rea.*

McNair J., directing the jury, said that the present case did not concern recklessness, nor the state of mind of the accused. Whether the accused was driving in a dangerous manner was purely a question of fact. The jury were to look at the facts as intelligent bystanders and to decide whether they were completely satisfied that the manner in which this man was driving at the time was dangerous to the public. They were to take into account all the circumstances, including the nature, condition and use of the road, and the amount of traffic on it at the time. The jury returned a verdict of not guilty.

[C. M. McOustra, *Barrister-at-Law.*]

COMMENTARY. Under section 11 (1) of the Road Traffic Act, 1930, it is a misdemeanour, punishable with four months' imprisonment, to drive a motor-vehicle on a road " recklessly, or at a speed or in a manner which is dangerous to the public." Under section 8 (1) of the Road Traffic Act, 1956, it is a misdemeanour, punishable with five years' imprisonment, to cause death while so driving. It has been held, under the 1930 Act, that the words quoted create three separate offences: *R.* v. *Wilmot* (1933) 24 Cr.App.R. 63; so that an indictment charging the accused with driving " at a speed or in a manner " dangerous to the public is bad for duplicity: *cf. R.* v. *Wells* (1904) 91 L.T. 98. The position is undoubtedly the same under the 1956 Act. It follows that driving " recklessly " and driving " dangerously " are distinct offences. While recklessness seems to be subjective, requiring proof of some actual foresight by the accused of the likelihood of certain consequences, a man may drive dangerously without adverting at all to the possible risks involved in his conduct, and even though he may be taking all the care of which he, being an incompetent driver, is capable. The test, in the latter case, would seem therefore to be purely objective, and to require no more than a high degree of inadvertent negligence. So in *Kay* v. *Butterworth* (1945) 173 T.L.R. 191 the accused was held guilty of dangerous driving where, while returning in the morning after working a night-shift in a factory, he was overcome by sleep or drowsiness and drove the car into a party of soldiers marching in the same direction as himself. The court held that the driver " must have known that drowsiness was overtaking him ": *cf. Henderson* v. *Jones* [1956] Crim. L.R. 318.

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[6] For the prosecution: *Christmas Humphreys* (instructed by the Director of Public Prosecutions). For the defendant: *I. O. Griffiths* (instructed by Walter Burgis & Co.).

The question is discussed by Glanville Williams, *The Criminal Law—The General Part,* § 30, who concludes: " there seems to be no point in indicting for reckless driving; conviction is surer if the charge is of dangerous driving, which does not require proof of a mental state."

Supervision Order—*Conviction on two previous occasions—concurrent sentences for offence and for breach of a probation order*

R. *v.* PERFECT [7] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Streatfeild JJ.: April 15, 1957) (*The Times,* April 16, 1957).

P. was convicted by a magistrates' court of unlawful wounding and was committed for sentence to quarter sessions, where he was sentenced to eighteen months' imprisonment and a supervision order was made under section 22 of the Criminal Justice Act, 1948. The requisite notice had been served on P. as required by section 22, and at the hearing at quarter sessions he admitted that he had been placed on probation for two years in August, 1952, and that he had been sentenced to twelve months' imprisonment in August,

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[7] For the appellant: *Geoffrey Davey* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Dorothy Knight Dix* (instructed by the Prosecuting Solicitor, County Hall, Maidstone).

1954, for breach of that probation order. At the same time, in August, 1954, P. had been sentenced to twelve months' imprisonment for office-breaking, both sentences to run concurrently. On appeal to the Court of Criminal Appeal, P. argued that when he was sentenced for the present offence, he was not a person to whom section 22 applied because he had not been convicted on at least two previous occasions of offences for which he was sentenced to imprisonment.

Held, allowing the appeal, that there had been two separate convictions, the first in August, 1952, and the second in August, 1954, but the sentences were passed on the same day. By section 8 (5) of the Criminal Justice Act, 1948, quarter sessions had jurisdiction to deal with P. both for the offence committed in 1952, for which he had been placed on probation, and for the subsequent offence in 1954. The effect of section 12 (1) of the same Act had been explained in *R.* v. *Harris* [1951] 1 K.B. 107, and in *R.* v. *Stobbart* [1951] 2 All E.R. 753, and in the latter case it was emphasised how desirable it was to pass some sentence, even if a nominal one, where a probationer had broken the terms of his probation, so that the offence for which he had been dealt with would thereafter count as a conviction. Section 22, however, seemed to require not only convictions on two previous occasions but sentences of imprisonment on two previous occasions. This court had considered the words "previous occasions" in *R.* v. *Rogers* [1953] 1 Q.B. 311, where it was held that those words meant appearances at a separate court of quarter sessions or assize. The conviction for which the probation order was made did not rank as a conviction until the sentence was passed in August, 1954. The reasoning in *R.* v. *Rogers* applied to the present case and, accordingly, the order under section 22 would be quashed. [H. P.]

COMMENTARY. The statute uses the expression "previous occasions" in three places: section 21 (1) (*b*), which provides for corrective training and requires two previous occasions; section 21 (2) (*b*), which provides for preventive detention and requires three previous occasions; and section 22 (1) (*b*), which provides for supervision orders and requires two previous occasions. In *R.* v. *Rogers* the court held that the phrase has the same meaning in each of these places.

The court, which was concerned with the preventive detention provision, explained its reason for holding that "previous occasions" meant appearances at a separate court as follows: ". . . it will then have been shown that his three previous appearances in court and the sentences imposed on him on three separate occasions have not done any good, and that the time has therefore come to impose a long sentence on him."

See also p. 398, above.

Acts and Orders *

Agriculture

Agriculture (Poisonous Substances) Amendment Regulations, 1957 (S.I. No. 605): operative April 11, 1957. The organophosphorus compounds, amiton and its salts, the arsenical compounds, potassium arsenite and sodium arsenite are added to the poisonous substances specified in the 1956 Regulations (S.I. 1956, No. 445; [1956] Crim.L.R. 428). In the case of the two latter substances workers must wear specified protective clothing before handling potato plants that have been sprayed therewith within the previous ten days.

For penalties for contravention, see section 4 of the Agriculture (Poisonous Substances) Act, 1952.

Grass and Clover Seeds General Licence, 1957 (S.I. No. 579): operative April 8, 1957; Scotland (S.I. No. 699): operative April 18, 1957. The time during which particulars of germination of certain grass and clover seeds may be given to a purchaser by the seller of those seeds is extended for two periods in the year 1957, and the provisions of the Seeds Act, 1920, as amended by the Agriculture (Miscellaneous Provisions) Act, 1954, are modified accordingly. The two periods are April 8 (April 18 in Scotland) to May 15, 1957, inclusive, and August 1 to October 15, 1957, inclusive. The time for delivery of particulars other than those of germination remains unaffected by the licence.

Animals: see p. 410, below.

Aliens

Aliens Order, 1957 (S.I. No. 597): operative April 15, 1957. The Aliens Order, 1953 (S.I. 1953, No. 1671; [1954] Crim.L.R. 68, 259) is amended. The provisions relating to hotel registers are relaxed and instead of a visitor being obliged to enter or secure the entry in a register of his name, nationality and date of arrival and, in the case of an alien, to furnish in addition a signed statement in a prescribed form, it is now sufficient for the visitor to give the hotel keeper the specified information personally or through a third person, orally or in writing. The hotel keeper must keep a written record of such information for a period of one year (paras. 1, 2, 3 and 7 of the Schedule). Paragraph 8 makes a transitional provision. The relaxations as to registration and length of stay in the country of certain aliens which were contained in paragraph 4 of the First Schedule to the 1953 Order are extended by paragraph 5 of the Schedule to the Order to Austrians, Finns, Portuguese and Germans holding passports issued by the Federal Republic of Germany. Paragraph 6 of the Schedule adds to the particulars relating to aliens which are to be entered in local registers, particulars as to matrimonial status.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

Article 26 (4) of the 1953 Order requires the consent of the D.P.P. to certain prosecutions. It is now made clear that this provision does not apply to Scotland.

For penalties for contraventions see Articles 25–27 of the Aliens Order, 1953, as amended by section 2 of Part I of the Schedule to this Order.

Animals

DISEASES OF ANIMALS (WASTE FOODS) ORDER, 1957 (S.I. No. 628): operative June 1, 1957. Waste foods may, if not boiled for one hour, spread foot-and-mouth and other diseases; it is therefore prohibited to feed unboiled waste foods to certain animals or poultry. Where a person has collected from other premises on to his own premises any waste foods for feeding to animals or poultry the foods must not be used on or moved from his premises unless they have first been boiled for one hour in a plant licensed by the local authority. The carriage of animals, poultry or feeding-stuffs in a vehicle that is carrying unboiled waste foods is prohibited, and where vehicles and containers have carried such foods they must be disinfected on each occasion before they are again used for carrying animals, poultry or feeding-stuffs.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

Atomic Energy

TRANSFER OF FUNCTIONS (ATOMIC ENERGY AND RADIOACTVE SUBSTANCES) ORDER, 1957 (S.I. No. 561): operative April 2, 1957. Provision is made for the transfer to the Prime Minister of the functions hitherto performed by the Lord President of the Council under the Atomic Energy Act, 1946, the Radioactive Substances Act, 1948, and the Atomic Energy Authority Act, 1954.

Civil Aviation

AIR NAVIGATION (GENERAL) (SECOND AMENDMENT) REGULATIONS, 1957 (S.I. No. 627): operative April 9, 1957. The principal

Regulations (S.I. 1954, No. 829; [1954] Crim.L.R. 640) are amended by removing from the "A Conditions," under which aircraft may fly within the United Kingdom unregistered or without a certificate of airworthiness, the condition confining flights by such aircraft to a limited distance from the departure aerodrome. From August 1, 1957, revised requirements are imposed relative to the food and water to be carried in dinghies forming part of the safety equipment of public transport aeroplanes, and the types of flight upon which such aircraft must carry a flight navigator as an additional crew member. Revised visual, colour perception and hearing standards are to be applied to applicants for the grant or renewal of air crew licences. A small amendment is also made to take account of the provisions of the Air Navigation (Fifth Amendment) Order, 1957 (S.I. 1957, No. 278), which relates to flying hours.

For penalties for contraventions, see article 67 of the Air Navigation Order, 1954 (S.I. No. 829).

Customs and Excise

CUSTOMS DUTIES (DUMPING AND SUBSIDIES) ACT, 1957 (5 & 6 Eliz. 2, c. 18): operative April 17, 1957. Authority is given for the imposition of duties of Customs where goods have been imported into the United Kingdom in circumstances in which, under the provisions of the Act, they may be regarded as having been dumped or, in certain circumstances, subsidised. The Commissioners of Customs and Excise are empowered to require the importer of any goods to state various facts concerning the history of the goods, and if he fails to do so, the history of those goods shall be deemed, for the purposes of this Act, to be such as the Commissioners may determine.

Dangerous Drugs

DANGEROUS DRUGS REGULATIONS, 1957 (S.I. No. 704): operative May 1, 1957. The list of drugs set out in the 1953 Regulations (S.I. 1953, No. 499) is brought up to date, and the 1954 Regulations (S.I. 1954, No. 1047; [1954] Crim.L.R. 800) are revoked. Regulation 2 substitutes a new Regulation 17 (1) (*c*) in the principal, 1953, Regulations in order to make it clear that a separate register or part of the register must be used for entries made with respect to each new drug brought under control after the date of these Regulations, and the wording of Regulation 17 (1) (*b*) has been revised in order to make it clear that a separate register or part of a register need be kept only with respect to drugs actually obtained or supplied. Regulation 3 makes it clear that the relaxation as to the requirements concerning the making of entries, which are allowed under the 1953 Regulations to medical practitioners and authorised sellers of poisons, are confined to drugs supplied by those persons. There are various minor amendments.

For penalties for contraventions, see section 15 of the Dangerous Drugs Act, 1951.

Defence Regulations

MOTOR FUEL (NO. 2) ORDER, 1957 (S.I. No. 520): operative April 1, 1957. Heavy oil is removed from the controls imposed by the Motor Fuel (No. 2) Order, 1956 (S.I. 1956, No. 1840; [1957] Crim.L.R. 64), and may be supplied and acquired without the surrender of coupons. The basic ration for private motor-vehicles is increased by prescribing that the coupons for all six months in the motor fuel ration book shall be valid at any time from April 17 to August 16, 1957, inclusive.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

Emergency Laws

COAL DISTRIBUTION (AMENDMENT) ORDER, 1957 (S.I. No. 519): operative April 1, 1957. The principal Order (S.I. 1943, No. 1138) is amended so that an occupier of controlled premises may now change his licensed merchant without giving reasons if he applies to the Local Fuel Overseer between April 1 and August 31, 1957.

COAL DISTRIBUTION (RESTRICTION) DIRECTION, 1957 (S.I. No. 696): operative May 1, 1957. The maximum aggregate quantities of various classes of coal which may be furnished or acquired between May 1, 1957, and April 30, 1958, for consumption in controlled premises as defined in the Coal Distribution Order, 1943 (S.I. No. 1138), are specified. Manufactured fuel carbonised to any extent in the process of manufacture is now added to the classes of coal excepted from the restriction. The whole of the maximum aggregate quantity (40 cwt.) of the classes of boiler fuel specified in paragraph 4 may now be supplied or acquired during the summer period.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

Food and Drugs

MILK (GREAT BRITAIN) (AMENDMENT) ORDER, 1957 (S.I. No. 514); NORTHERN IRELAND (S.I. No. 515): both operative April 1, 1957. The maximum price of milk on sale in Great Britain and

Northern Ireland is reduced by ½d. per pint for the months of April, May and June, 1957. The seasonal increase of ½d. per pint in the maximum price of certain types of Channel Islands and South Devon milks becomes operative in England and Wales during the months of September, October and November, 1957.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

London

LONDON CAB ORDER, 1957 (S.I. No. 674): operative April 24, 1957. From the operative date the surcharge of sixpence payable for the hiring of a cab in addition to the sum recorded on the taximeter is no longer payable. The Order of 1956 (S.I. No. 1988; [1957] Crim. L.R. 127) is accordingly revoked.

The following Orders have been made in respect of restrictions on waiting and loading: S.I. No. 479 (Central London); S.I. No. 480 (City of London); S.I. No. 481 (Outer London). These Regulations consolidate with amendments similar Regulations made in 1951, as subsequently amended. The principal changes are that the restrictions are applied to various additional streets, and in certain cases more stringent restrictions are imposed on vehicles with regard to loading and unloading between certain times.

The following Orders have been made respecting unilateral waiting:—S.I. No. 482 (Westminster); S.I. No. 483 (Chelsea, St. Marylebone, St. Pancras, Westminster and Surbiton); S.I. No. 484 (Westminster, Holborn, Paddington, St. Marylebone, St. Pancras).

Magistrates' Courts

The following Order has been made altering petty sessional divisions: S.I. 1957, No. 577 (Staffordshire, Pentridge and Cannock).

Medicine

THERAPEUTIC SUBSTANCES AMENDMENT REGULATIONS, 1957 (S.I. No. 550): operative May 1, 1957. The substances specified in regulation 3 are added to those set out in the First Schedule to the Therapeutic Substances Act, 1956 ([1956] Crim.L.R. 353). Detailed amendments are also made to the principal Regulations (S.I. 1952, No. 1937), as amended.

For penalties for contraventions, see sections 6 and 12 of the 1956 Act.

Merchant Shipping

MERCHANT SHIPPING (LOAD LINE CONVENTION) (VARIOUS COUNTRIES) ORDER, 1957 (S.I. No. 599): operative April 12, 1957.

Various French possessions and administered Trust Territories have acceded to the Load Line Convention.

Northern Ireland

Milk: see p. 412, above.

Parliament

HOUSE OF COMMONS DISQUALIFICATION ACT, 1957 (5 & 6 Eliz. 2, c. 20): operative April 17, 1957. Changes are made in the specified offices which disqualify the holders for membership of the House of Commons, and corresponding provisions are made in respect of the Senate and House of Commons of Northern Ireland; various enactments are repealed in consequence. If a person who is elected for membership of the House of Commons is a person disqualified by the Act, the election is void, and if an existing Member becomes disqualified his seat is to be vacated. The House of Commons is, however, empowered to direct that any such disqualification shall be disregarded, provided that it has since been removed; but such a direction will not affect the proceedings on any election petition or any determination of any election count. Section 7 specifies the procedure to be followed by any person who claims that a purported Member of the House of Commons is disqualified by this Act.

Poisons

Agriculture: see p. 409, above.

Police

HAMPSHIRE POLICE (AMALGAMATION) ORDER, 1957 (S.I. No. 534): operative April 1, 1957. The Hampshire constabulary police authority, police area and police fund are renamed the Hampshire and Isle of Wight constabulary, police authority, police area and police fund, and the method of computing the contributions of the constituent authorities to the police fund are varied.

POLICE REGULATIONS, 1957 (S.I. No. 694): operative April 16, 1957, and taking effect as from February 1, 1957. The Police Regulations, 1952 (S.I. No. 1704), are amended to provide for increased rates of detective duty allowance, and increased scales of pay for inspectors, sergeants and constables. The detailed increases of pay and allowances are set out in the Schedule to these Regulations.

Practice

INDICTMENT RULES, 1957 (S.I. No. 669): operative April 22,

1957. Provision is made as to indictments for capital murder consequential upon the passing of the Homicide Act, 1957 ([1957] Crim.L.R. 282). Rule 1 inserts a new rule 4A in the Indictment Rules, 1915 (scheduled to the Indictments Act, 1915). Paragraph 1 of the new rule makes it clear that a person charged with capital murder and a person charged in respect of the same death with murder, but not with capital murder, may be charged jointly in a single count; paragraph 2 provides that any two or more of the matters mentioned in subsection (1) or (2) of section 5 of the Homicide Act (that is, matters making the murder a capital murder) may be included, either cumulatively or in the alternative, in the particulars of a count charging capital murder. Rule 2 prescribes forms of indictment for capital murder.

Public Health

Smoke Control Areas (Exempted Fireplaces) Order, 1957 (S.I. No. 541); (Scotland) (S.I. No. 544): both operative April 8, 1957. Fireplaces specially designed or adapted for combustion of liquid fuel are exempted from the provisions of section 11 of the Clean Air Act, 1956 ([1956] Crim.L.R. 645) (which relates to smoke control areas), provided that they are so installed, maintained and operated as to minimise the emission of smoke.

For penalties for contraventions, see section 27 of the Clean Air Act.

Revenue

Exchange Control (Authorised Dealers) Order, 1957 (S.I. No. 665); Authorised Depositaries (S.I. No. 666): both operative April 16, 1957. The names of banks and other persons authorised under the Exchange Control Act, 1947, to deal in gold and foreign currency, and the names of authorised depositaries with whom under that Act certain securities are required to be deposited, are set out in the Schedules to these Orders.

For penalties for contraventions, see Schedule 5 of the Act of 1947.

Road Traffic

Road and Rail Traffic Act (Exemption) Regulations, 1957 (S.I. No. 525): operative April 16, 1957. The Regulations of 1951 (S.I. No. 1641) are re-enacted with certain amendments of which the principal are the granting of exemptions in the following additional cases:—(1) The exemption given in certain cases to vehicles hired to the fighting Services is extended to vehicles similarly used by Visiting Forces (reg. 2 (*a*)); (2) the exemption granted to commercial travellers when using private cars adapted to carry samples is extended to dual-purpose vehicles when used to carry samples (reg. 2 (*k*)); (3) the exemption covering the use of motor-cycles for the carriage of tools and materials required by the driver in carrying on his trade or business is extended to include dual-purpose vehicles when used in this way (reg. 2 (*m*)); (4) the exemption granted to farmers under section 1 (7) (*a*) of the Road and Rail Traffic Act, 1933, in respect of the goods vehicles they operate under farmers' "F" excise licences, is extended to include dual-purpose vehicles (reg. 2 (*q*)); (5) the use of a vehicle fitted with an item of plant and carrying only articles required for the operation of the plant and vehicle (reg. 2 (*r*)); (6) the use of a vehicle to distribute grit, salt, etc., on roads during wintry conditions (reg. 2 (*s*)).

ROAD VEHICLES (EXCISE DUTIES AND LICENCES) (AMENDMENT) ORDER, 1957 (S.I. No. 601): operative May 1, 1957. The principal Order (S.I. 1953, No. 1560) is amended so as to relax the restrictions imposed which prevented applications being made at a Post Office for the renewal of a licence for goods vehicles, tractors and certain other vehicles.

REMOVAL OF VEHICLES REGULATIONS, 1957. ENGLAND AND WALES (S.I. No. 675); SCOTLAND (S.I. No. 676): both operative May 1, 1957. The 1938 Regulations (S.R. & O. No. 79) are revoked, and new provisions are made empowering the police to require the owner, driver or other person in control or in charge of a vehicle to move it if it is a vehicle which has broken down or been left on a road and is likely to cause danger or is causing obstruction or if it is a vehicle which has been left on a road in contravention of a statutory prohibition or restriction having effect under any of the enactments mentioned in the Schedule, *e.g.*, a prohibition or restriction on waiting or parking. The Regulations also empower the police to move, or remove from the roads altogether, any such vehicle and any vehicle which, having been left on a road or having broken down, appears to have been abandoned, but the exercise of this power on the ground of obstruction only is subject to the limitations contained in the proviso to regulation 4. Where a vehicle is removed from the roads altogether under these Regulations the police are required to make arrangements for the safe custody of the vehicle and of its load.

ROAD VEHICLES (PART YEAR LICENSING) ORDER, 1957 (S.I. No. 703): operative May 1, 1957. The Order of 1939 (S.I. No. 1807) is revoked and new provisions are made as regards the periods of less than a year for which an excise licence may be taken out in respect of a mechanically propelled vehicle, and as regards the duty payable in respect of a licence for any such period. The principal changes are (1) that in the case of a vehicle for which the annual rate of duty is £3 or less the periods are limited to the last quarter of the calendar year or any period falling within, and ending on, the last day of that quarter, and (2) that in any case a minimum duty of five shillings will be payable.

ROAD VEHICLES (REGISTRATION AND LICENSING) (AMENDMENT) REGULATIONS, 1957 (S.I. No. 701): operative May 1, 1957. The 1955 Regulations (S.I. 1955, No. 1664; [1956] Crim.L.R. 65) are amended. The principal changes are: (1) A person who acquires a mechanically propelled vehicle intended for use only under a trade licence need no longer notify the appropriate council of the acquisition immediately after he acquires the vehicle but must do so on any transfer of the vehicle to some other person taking place within three months from the date when he acquired it or, if there is no such transfer, at the end of three months. (2) Renewal of a vehicle excise licence may be made at a Post Office even though there has been a change of ownership since the last licence was issued, if certain conditions are satisfied. (3) Renewal of a licence may no longer be made at a Post Office if any alteration to the vehicle or any change in its use since the issue of the last licence has caused the vehicle to fall within a different class or description for the purpose of determining the duty payable under the Act, notwithstanding that the alteration has not affected the amount of duty payable. (4) Licences for goods vehicles, tractors and certain other vehicles may again be renewed at a Post Office.

For penalties for contraventions, see section 25 of the Vehicles (Excise) Act, 1949.

Salmon and Freshwater Fisheries

WYE RIVER BOARD AREA (EELS AND ELVERS) ORDER, 1957 (S.I. No. 604): operative April 5, 1957. The Wye River Board is empowered to make by-laws in respect of eel and elver fisheries, and the provisions of the Salmon and Freshwater Fisheries Acts, 1923 to 1935, relating to licences, prohibited modes of fishing and the prohibition of using roe, are extended to these fisheries.

Scotland

Road traffic: see p. 415, above.

Smoke control areas: see p. 415, above.

Theatre and Cinematograph

CINEMATOGRAPH FILMS ACT, 1957 (5 & 6 Eliz. 2, c. 21): operative April 17, 1957. Provision is made, *inter alia*, for the imposition of a levy on exhibitors of films and for the making from the proceeds thereof of payments to, or for the benefit of, makers of British cinematograph films and to the Children's Film Foundation, Ltd., and the provisions of section 1 of the 1948 Act (which makes obligatory the inclusion of British films amongst registered films exhibited to the public in Great Britain) are extended for a further period, until 1960.

The Commissioners of Customs and Excise are empowered to serve a notice in writing on any exhibitor requiring him to furnish information and keep various records concerning the matters the subject of the Act (section 4).

For penalties for contraventions, see section 4 of the Act.

Wireless Telegraphy

WIRELESS TELEGRAPHY (BROADCAST LICENCE CHARGES) AMENDMENT (NO. 1) REGULATIONS, 1957 (S.I. No. 509): operative May 25, 1957. The principal Regulations (S.I. 1954, No. 438; [1954] Crim.L.R. 481) are amended by the addition to the First Schedule thereof of two forms of multiple broadcast receiving licences. The fees payable on issue are prescribed.

For penalties for contraventions, see section 14 of the Wireless Telegraphy Act, 1949.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

30. *Committal of offence of taking and driving away motor-vehicle without owner's consent on private property*

Could you please give me your view as to whether or not the offence of "taking and driving away a motor-vehicle without the consent of the owner" (Road Traffic Act, 1930, s. 28) can be committed where the whole of the offence is completed on private property which in no way can be construed as a road.

I have consulted several textbooks but have been unable to find any reference to this point. Section 29 of the Act of 1930 (to get on to or to tamper with the mechanism of a motor-vehicle) clearly defines the place where this offence may be committed as a road or public authority parking place. Section 28, however, makes no mention of this and therefore, in my opinion, it is possible for a charge to be made under this section, where the offence takes place on private ground.

I should be glad of your opinion on this matter and also any quoted authority on this point. [G. V. P.]

ANSWER

Section 28 of the Road Traffic Act, 1930, does not specify any particular venue for the offence. Presumably the reason for this is that the stealing of motor-vehicles was in the mind of the legislature when the Act was passed; the offence is akin to larceny, and is designed to protect car owners from what would become theft if the necessary intent permanently to deprive were present. In this respect the offence differs from most of the other offences, *e.g.*, section 29, which were designed to protect the public at large (not merely the car owner) and so are restricted in their operations to roads, public place, etc. We know of no authority to quote upon this point; indeed, no authority is necessary as the wording of section 28 is quite clear. [N. W.]

31. *Whether law relating to bagatelle board applies to electrically operated pin-table.*

Section 2 of the Billiards Ordinance of this colony (which is almost identical with section 11 of the Gaming Act, 1845), enacts that ". . . every house, room or place kept for public billiard playing, or where a public billiard table, bagatelle board, or instrument used in any game of the like kind, is kept, at which persons are admitted to play . . . shall be licensed under" the Ordinance.

A number of persons were found in the rear portion of a shop which contained three electrically operated pin-tables. There was evidence from which the magistrate could infer (1) that these persons were members of the public and not simply friends of the owner of the shop; and (2) that some of them had been playing on these pin-tables. The owner was charged with keeping these instruments, to wit, three pin-tables for public use, without being duly licensed so to do in respect of the premises in which such instruments were kept. Evidence was adduced, and accepted, by the magistrate that the manner of playing the electrically operated pin-tables was similar in design and in principle to the ordinary bagatelle board and it was contended that the pin-tables fall within the words "bagatelle board or instrument used in any game of the like kind." The magistrate accepted that contention and, since the pin-tables were not duly licensed, convicted the owner of the offence as charged.

Assuming the principle of the game and the manner of scoring on an electrically operated pin-table is the same as that on a bagatelle board, can the electrically operated pin-table properly be said to fall within the words "or instrument used in any game of the like kind" for the purposes of the section? It must, of course, be clear that such pin-tables could not have been in the minds of the legislators at the time the enactment was passed. [P. S.]

ANSWER

The essence of this question is whether a statute controlling certain things is limited in its effect to the forms or varieties of those things existing or possible at the time of the enactment, or whether it can later be extended to comprehend new forms of those things, invented after the original enactment. This question was settled authoritatively in the case of *Taylor* v. *Goodwin* (1879) 4 Q.B.D. 228. This case, which was an appeal by way of case stated, turned upon the question whether the word "carriage," as used in section 78 of the Highway Act, 1835, could be held to include a bicycle—a form of conveyance that could scarcely have been contemplated by the legislature at the time the Act was passed. In deciding that a bicycle can indeed be a carriage for the purpose of the 1835 Act, the court considered that the important thing was the mischief aimed at by the 1835 Act. Clearly, it was the danger to pedestrians arising from the use of wheeled vehicles on the highway; and therefore, subsequently invented vehicles producing similar dangers could be held to be within the scope of the Act of 1835. We think, therefore, that there can be no doubt whatsoever that, although electrically operated pin-tables had not been heard of when the Billiards Ordinance was passed the mischief produced by such a machine is precisely of the same nature as the mischief produced by the kind of instrument contemplated in the Ordinance, and that an electrically operated pin-table can properly be said to fall within the words " or instrument used in any game of the like kind " for the purpose of the section. We offer this opinion on the assumption that there is nothing in the Indian Penal Code which would negative such an argument. [N. W.]

Books and Periodicals

Reviews:

Hypnotism and Crime. By Heinz E. Hammerschlag. Translated by Professor John Cohen, Professor of Psychology, University of Manchester. London: Rider & Co. 1956. 137 and (references, bibliography and index) 9 pp. (13s. 6d. net.)

One question which has constantly arisen in the history of hypnosis is whether the hypnotised subject may be made the victim or the instrument of crime. Late nineteenth-century writers frequently agitated the problem, and there were many European and American trials, besides experimental cases, where the matter was raised. On the basis of experiments J. Milne Bramwell thought that when the act demanded was contrary to his moral sense it was invariably refused by the hypnotised subject. Moll, however, reviewing the actual cases and the conclusions of other hypnotists, was forced to admit that in exceptional cases it was possible for a person to be induced to commit acts which were contrary to his disposition. Some comfort was derived from the argument that repeated hypnotism rather than a single hypnotic attack would be required, and from the probability that the hypnotist could not be shielded from eventual discovery.

The author of this book, translated from the German by Professor Cohen of Manchester, takes up the problem once more. In a series of vivid and dramatic chapters he reviews some of the old cases where crimes were allegedly committed under hypnosis. These are instructive, for although mentioned in the standard works and monographs, detailed reports are generally inaccessible here. Of one of these cases the author perhaps makes too much. Whether the *Czynski* case of 1894 was one of rape under hypnosis or seduction under the influence of love is a question hardly worth reopening now, especially when the author puts this argument rather melodramatically. His distinction between suggestion and hypnosis could have been more effectively made otherwise. Likewise the discussion of *Castellan's* and *Salamon's* cases adds little new to the existing knowledge.

Infinitely more valuable are the accounts and discussion of two more modern cases. The confession of van der Lubbe to the firing of the Reichstag by himself alone gives rise to a rather terrifying review of the power of post-hypnotic suggestion, of narco-hypnosis (which by misuse can become " the torture method of our century "), and of the " conveyor " system of endless interrogation of political prisoners in order to implant a suggestion in the accused's mind, " for which one creates a suitable soil by so exhausting the accused till his consciousness is excluded and then hammering into him the desired content." The chapter will explain much of Eastern European political trials. Equally important and interesting is the chapter on the *Heidelberg* case, and the means by which Dr. Mayer succeeded by hypnosis in opening the gates of the subject's memory, which had been very skilfully blocked by an unscrupulous hypnotist, who had taken advantage of her financially and sexually, and had even induced her to attempt several times to murder her husband. Dr. Hammerschlag concludes that " there is no basis whatsoever for the view that moral weakness in a hypnotised subject is a condition for the misuse of hypnosis and that he could have been incited to a misdeed even consciously. The danger lies much more in the fact that under the influence of hypnosis the existing moral faculty is circumvented." The author further asserts that hypnosis may be deepened to the point of obliterating or excluding the core of personality, and although the criminal use of hypnosis is diminished by the probability of eventual exposure, the possibility of an obliteration of memory cannot be ruled out. These conclusions may not be comforting, but they do not shrink from the realities as seen by many hypnotists. These two chapters alone are worth the price.

The translator has predicted that readers will be captivated and instructed by this volume. There is every indication that this will be so.

C. A. MORRISON.

Road Traffic Offences. Second edition. By G. S. Wilkinson, Solicitor, Clerk to the Dudley Justices. London: The Solicitors' Law Stationery Society, Ltd. 1956. xl and 221 and (appendices and index) 55 pp. (35s. net.)

This is a second edition of Mr. Wilkinson's excellent book *Road Traffic Prosecutions,* the title having been changed in answer to criticism. *Road Traffic Offences* is considerably longer than its predecessor, but sets forth the law in the same clear fashion. The text has been brought up to date not only by the inclusion of the provisions of the Road Traffic Act, 1956, but also of recent cases and regulations. The medical tests for intoxication, taken from the British Medical Association's pamphlet " The Recognition of Intoxication," are set out in an appendix—a further indication of the thoroughness with which the author has covered his subject. This is a comprehensive book which will be of use to all who are concerned with the administration and enforcement of road traffic law.

V. W.

My Greatest Crime Story. By Police Chiefs of the World. Edited by Kurt Singer. London: W. H. Allen. 1956. 224 pp. (13s. 6d. net.)

Mr. Singer has collected in this volume the best remembered cases of Police Chiefs from all over the world, from Moscow to Washington. There have been a number of collections of crime stories and many of these suffer from treading familiar ground time and again. This book includes stories that will be new to readers. They are not all concerned with murder and they are not all success stories. Most of the stories are exciting and some are amusing, especially the one from Brazil where a murderer shares a cell with the man he has " murdered."

This book can be highly recommended.

P. A.

Late Sittings. By A. Laurence Polak, B.A.(HONS.CLASSICS),LOND., Solicitor of the Supreme Court. Illustrated by Leslie Starke. Chichester: Justice of the Peace, Ltd. 1956. ix and 107 pp. (9s. 6d. net.)

This book is a further collection of light articles which have been published in the *Justice of the Peace and Local Government Review.* They are entertaining and amusingly illustrated by Mr. Leslie Starke.

P. A.

Special Branch Officer. International security assignments of ex-Superintendent George Wilkinson. London: Odhams Press, Ltd. 1956. 250 and 4 pp. (16s. net.)

Country Copper. The Autobiography of Superintendent G. H. Totterdell, C.I.D., of the Essex County Police. London: George G. Harrap & Co., Ltd. 1956. 248 and (appendices) 5 pp. (15s. net.)

Craftsmen in Crime. A Continental Casebook. By Tom Fallon. London: Frederick Muller, Ltd. 1956. 240 pp. (15s. net.)

Smugglers Ahoy! By Ben Herrington, O.B.E. London: Frederick Muller, Ltd. 1957. 192 pp. (15s. net.)

Books by, and about, police officers and criminals pour from publishers in a steady stream, and here is a characteristic batch. Like most of their kind they tend to the prosaic in style, and to repetition in content. None of these is outstandingly good or bad.

Special Branch Officer is not as interesting as its title may suggest: it deals only with one facet of Special Branch activities, the protection of public figures. It has some sidelights on the Russians which confirm that they are different from the British—not a very surprising conclusion.

Country Copper is about an Essex police officer. The nearness of his beat to the metropolis robs his work of any distinguishing feature.

Craftsmen in Crime is described as a Continental casebook, and its main interest lies in its descriptions of some of the extraordinary things that crooks get up to in trying to cover their crimes.

Smugglers Ahoy! is by a former Waterguard officer and is therefore somewhat different in background. Otherwise it is not particularly distinguished.

M. W. M.

Books Received:

They Hanged My Saintly Billy. By Robert Graves. London: Cassell & Co., Ltd. 1957. xi and 269 pp. (21s. net.)

Stone's Justices' Manual. Eighty-ninth edition. By James Whiteside, O.B.E., Solicitor, Clerk to the Justices, and J. P. Wilson, Solicitor, Clerk to the Justices. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. 1957. Vol. 1, cccxxxvi and 1302 and (index) 227 pp.; Vol. 2, vii and 1711 and (index) 227 pp. (Thin edition, 95s. net; thick edition, 90s. net.)

The University Teaching of Social Sciences. Criminology. Reports prepared on behalf of the International Society of Criminology. UNESCO. 1957. 164 pp. (10s. 6d. net.)

Reader's Digest:

Animals: Control of dogs on roads (based on the Road Traffic Act, 1956, s. 15): 121 *Justice of the Peace* 258.

Children and young persons: Child-guidance clinics and the prevention of juvenile delinquency: 7 *British Journal of Delinquency* 271.

Drugs: The system of international narcotics control: *International Criminal Police Review,* March, 1957, p. 66.

Evidence: Admissibility of evidence as part of the *res gesta*: *Cambridge Law Journal,* November, 1956, p. 199; April, 1957, p. 55.

Evidence: The test of a child's competence to give evidence: 223 *Law Times* 215.

Firearms: Antique weapons: 65 *Police Review* 240.

Forensic science: In the first number of volume 4 of the *Journal of Forensic Medicine* there are articles concerning ante-mortem and post-mortem bruises of the skin (p. 2); sex determination of human tissues (p. 11); and adipocere, one of the products of decomposition (p. 18).

Forensic science: Location of the outbreak of fire in burnt buildings: *International Criminal Police Review,* March, 1957, p. 82.

Larceny: The effect of mistake (based on *Moynes* v. *Coopper* [1956] Crim.L.R. 268): 82 *Journal of Criminal Law* 177.

Obscenity: Prevention of importation of foreign books by the Commissioners of Customs and Excise: 121 *Justice of the Peace* 224.

Police: Observations of a justices' clerk on the problem of police manpower: 65 *Police Review* 294.

Probation: The powers which a court may exercise on a breach of probation (based on *R.* v. *Havant Justices, ex p. Jacobs* [1957] Crim. L.R. 254): 121 *Justice of the Peace* 259.

Trial: Preliminary examinations before magistrates: 82 *Journal of Criminal Law* 173.

THE CRIMINAL LAW REVIEW

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Barristers-at-Law

Editorial

Wire-Tapping

The question which stands out clearly from the dust raised over the recent interception of telephone conversations appears to be; when is it justified for the Government to use methods ascribed to the Police State? Whilst most are agreed that such action is justified to protect the country in time of war, the rest of the subject remains a battle ground for those who wish to take up arms on behalf of the liberty of the subject against those wishing to protect the many against the criminal activities of the few.

In our next issue we hope to publish an article considering the power of the Government, the source of this power, its use and abuse, and the particular facts in issue.

Increase in crime

The Home Secretary, addressing the Annual Conference of Chief Police Officers at Scarborough on May 29, expressed concern at the upward trend in the statistics relating to practically all indictable offences, and in particular the increase in the number of young men between the ages of seventeen and twenty-one found guilty of indictable offences.

In speaking of the relationship between the police and the Home Office Mr. Butler said: " We are both first and foremost concerned to see that people refrain from breaking the law; but if, despite the preventive work of the police, people do break the law, then we are concerned that they should be quickly brought to justice. Thereafter it is my responsibility first to see that the best means of treatment which knowledge and experience can devise are available to the courts, and secondly, to ensure that those who are sentenced to some form of detention are so dealt with while detained that they will not offend again." He went on to say that there was a great need for research into the problems of crime and the treatment of offenders and revealed that he was setting up in the Home Office a small specialised research unit.

Other matters touched upon by the Home Secretary were: the Road Traffic Act, 1956; the Magistrates' Courts Bill (now an Act); the United Kingdom police in Cyprus; and police force strength, which has risen to the unprecedented figure of 69,291 men and women in England and Wales. The numbers of the special constabulary have, however, fallen.

Scotland

The "Criminal Statistics, Scotland, 1956," also show an increase in the number of crimes and offences. The most spectacular of these is in the number of cases of driving when under the influence of drink, an increase of 28·2 per cent. over the figures for 1955.

Reports of Prison Commissioners

As was noted in [1957] Crim.L.R. 353 the Home Secretary has been examining the problem raised by the reading out in court of the reports made on prisoners eligible for preventive detention, corrective training or Borstal training. He has now caused a letter to be sent to clerks of the peace on this matter, see p. 460, below.

Report of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency

This report, published by the Stationery Office on May 29 (Cmnd. 169) recommends radical changes in the law relating to mental patients, with particular reference to giving such patients suitable treatment with no more restriction of liberty or legal formality than in other types of illness or social difficulty. Severe limitation of powers of compulsion, the establishment of review tribunals for the independent investigation into the need for detention with a right of appeal on point of law to the High Court, and the abolition of out-moded terms, are among the principal changes suggested.

Gangsters

Passing sentence on Anthony John Rice at the Central Criminal Court on May 23 for receiving a number of stolen car registration books, Judge Maude, referring to the defendant's refusal to disclose the names of persons from whom he received the books, said: "I am going to punish you simply and solely for what you have done. If there is atmosphere in this case because some notorious person has been mentioned I am quite free from that atmosphere. I am not interested in that other person."

Police powers

Cassels J. said at Dorset Assizes, Dorchester, on May 18, that questions put to a man by two police officers were of a type which not even a court of law would be entitled to administer to him while he was in the dock. "The duty of the police is to bring a man to court. They are not entitled to do anything in the nature of a trial. They do not try the case. The jury does."

Legal tender

960 farthings were tendered to the Southend Fees and Fines Court on Saturday, June 1, in payment of a £1 motoring fine. Refusing the coins, the chairman said that the coins were legal tender only up to a shilling. Later, however, after an adjournment, the court accepted the coins.

Public appearances

The Birmingham police force recently assisted in a B.B.C. filmed television programme entitled "Crime in a Big City" in the "Eye to Eye" series. Also taking part in the broadcast were numerous cracksmen, petty thieves and other convicted criminals, and the B.B.C. stated that no one who took part was an actor or actress except one shoplifter.

Parliament

Drunkenness

There were 60,182 convictions for offences of drunkenness in 1956, as opposed to 54,210 in 1955. Of these 5,385 were under twenty-one, as opposed to 4,417 in 1955 (H.C. Debates, Vol. 571, col. *45*, May 30).

Fingerprints

The Home Secretary has stated that, in ordinary circumstances, the police do not take the fingerprints of persons charged with minor offences. In absence of a court order the fingerprints of a person in police custody may be taken only with consent (H.C. Debates, Vol. 570, cols. *1397, 1398,* May 23).

Murder

The number of murders which became known to the police in the six months ending April 30, 1957, was 105, of which 35 became known after March 21, the date on which the Homicide Act received the Royal Assent. The numbers in the six months ending October 31, 1956, and April 30, 1956, respectively, were 94 and 73. The figures for all three periods include cases subsequently found not to be murders (H.C. Debates, Vol. 571, col. *45*, May 30).

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the Editor, *Criminal Law Review*, 3 Chancery Lane, London, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Causation in Homicide

By Glanville Williams, LL.D., *Barrister-at-Law*

The decision of the Court of Criminal Appeal in *Jordan* [1956] Crim.L.R. 700, deserves more attention than it has received, because it marks a significant departure from some of the older authorities on the subject of causation in homicide. For the first time it has become possible to say with reasonable confidence that where a person is unlawfully wounded, and afterwards dies as a result of negligent medical treatment, the death is too remote a consequence of the wound to found a charge of homicide, at least if the negligence in treatment is of a sufficiently serious character.

The victim in the case had been stabbed in the stomach during a fight. The wound was a severe one, perforating the gut. He was taken to hospital where an operation was performed, but died shortly afterwards from pneumonia. At the trial of his attacker for murder, it was assumed that the pneumonia was the natural consequence of the stab wound. But on an appeal against conviction fresh evidence was allowed to be called, and two doctors gave evidence that the death could not be said to have been caused by the wound. The stab wound had injured the intestine, but it was mainly healed at the time of death. In the view of these doctors, the death had been brought about by the treatment given in hospital. With a view to preventing infection it was thought right to administer an antibiotic, terramycin. This was the proper course, and a proper dose was administered. Some people, however, are intolerant to terramycin, and the deceased was one of these people. After the usual dose he developed diarrhoea, which was only properly attributable to the terramycin. The terramycin was stopped. Next day it was ordered again and recommenced the following day. The two doctors who gave evidence on the appeal said that to introduce a poisonous substance after the intolerance of the patient was shown was palpably wrong. Other steps were taken which were also regarded by the witnesses as wrong—namely, the intravenous introduction of wholly abnormal quantities of fluid far exceeding the output. As a result the lungs became waterlogged and pulmonary oedema and broncho-pneumonia followed.

In delivering the judgment of the Court of Criminal Appeal, Hallett J., after reciting the foregoing facts, stated the conclusion of law as follows: "Whatever the law may be when death results from any normal treatment as a result of a felonious injury, the court does not think it necessary to formulate any test as to what is necessary to establish causal connection. It is sufficient that in the present case there was not normal treatment. Not only was one feature wrong but two were, which produced the symptoms discovered at the post mortem examination which were the direct and immediate cause of death." Since the jury might have acquitted the accused if they had heard the evidence given on the appeal, the conviction was quashed.

Although the point is of no relevance to the question of law considered in the case, it must be mentioned, for the sake of the hospital in question, that the medical evidence given before the Court of Criminal Appeal has since been challenged. The Regional Hospital Board set up a committee of inquiry, which included three independent medical assessors, and this committee reported unanimously that it had no fault to find with the patient's treatment, which was in fact devoted and exemplary.[1] Since, for legal purposes, the facts have to be taken as they are found by the court, this will be ignored in the subsequent discussion. Whatever the rights or wrongs of the medical evidence, the decision in *Jordan* is undoubtedly an authority for saying that a charge of murder, brought under the rule that death following from serious bodily harm deliberately inflicted is murder, will fail if death would not have followed apart from grossly improper medical treatment. In arriving at its conclusion the court did not consider the authorities which tended in the opposite direction, perhaps because counsel for the Crown had admitted that each of these authorities had to be regarded as depending on its own facts. In this article it is proposed to review the earlier authorities in order to assess how far the present case shows a change of outlook. The whole subject of causation is a matter of such difficulty that it is desirable to give the discussion some kind of framework. As a beginning, let us distinguish between factual and legal causation.

Factual causation

Causation is always a question of fact as well as a question of law. In so far as it is a question of fact, it must be determined upon the evidence of witnesses. In so far as it is a question of law, it must be determined partly in accordance with certain rules but otherwise according to the intuitive reaction of the tribunal.

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[1] See *British Medical Journal*, September 22, 1956, p. 716; October 13, 1956, p. 888.

Causation as a question of fact may be called factual, physical, scientific or philosophical causation—though there are some who will object to each and every of these terms. For the legal cause there is also a considerable choice of adjectives, mostly objectionable—proximate cause, direct cause, decisive cause, and so on. The reader will doubtless have his own preference among these expressions, but in the present article the terms used will be simply " factual cause " and " legal cause."

The importance of the factual cause for legal purposes is that nothing that is not a factual cause can be a legal cause. A legal cause is, therefore, a species of factual cause. Roughly speaking, the factual cause is the cause without which the event would not have happened. Wherever necessary, expert evidence is admissible to determine the factual cause. Thus, in murder, it may be a question whether the deceased died from poison admittedly given him by the accused, or whether he died from natural causes (say, heart failure) before the poison had time to take effect. In the latter eventuality the accused would not be guilty of murder, though the intervention of the new and effective cause would not prevent a conviction for attempted murder.

The work of expert witnesses in an issue of this sort is purely diagnostic, and does not involve them in metaphysical subtleties. They do not have to distinguish between what is a " cause " and what is, in one use of language, merely a " condition." Even a mere predisposing condition is a factual cause for the present purpose. This is not to say that the common-sense distinction between a cause and a condition is irrelevant to the legal inquiry, but only that it is irrelevant to factual causation. The distinction between cause and condition may well be important when one comes to consider legal causation, but it is not a matter upon which the opinion of witnesses is required or should be allowed. For example, when in *Jordan* the two doctors stated that the death could not be said to have been caused by the wound, they were going outside their province. Factually the wound was a cause of the death, for if the victim had not been wounded he would not have been medically treated and then would not have died. It is, of course, proper for medical witnesses to say that a wound is not the medical cause of death.

Just as science cannot distinguish between a cause and a condition, so science cannot attach relative weights to causes. As Mill pointed out in his *Principles of Political Economy*, when two causes are necessary to the production of a particular result it is impossible to state scientifically which of those causes contributes the more. The proposition is denied from time to time, but unconvincingly. In law it may be necessary to make some kind of subjective pronouncement that one cause predominates over others; but this pronouncement is made by the tribunal, whether judge or jury, not by expert witnesses. It is a pronouncement in the realm of legal causation, not factual causation.

The burden of showing factual causation rests on the Crown, and it must be proved according to the standard usually required in a criminal case. Thus if a child dies after his father has neglected to secure medical attention for him, there can be no conviction for manslaughter unless it is shown that medical help would probably (not might possibly) have saved the child's life or postponed death (*Morby* (1882) 8 Q.B.D. 571 (C.C.R.)).

The acts of two or more persons may combine to produce a result. For example, if several persons acting in concert strike a man, and he dies as a result of the aggregate violence, this will be murder in all if there is the requisite intent (*Macklin* (1838) 2 Lew. 225). Nor need there be combination, for independent acts may concur in producing a result. Suppose that a platelayer negligently takes up the rails, and an engine-driver fails to keep a look-out, and the result of these two acts of negligence is a fatal accident; it is possible for both to be convicted of manslaughter (*Benge* (1865) 4 F. & F. 504). Such a situation, however, raises a question of legal causation (remoteness) as well as of factual causation, and the former is to be considered hereafter.

Sometimes it may be a difficult question of evidence whether a cause is concurrent or new and superseding. Suppose that D intentionally inflicts a mortal wound on P, and, before the wound has time to take effect, E, acting independently of D, cuts off P's head. D is not guilty of murder, because there has been an intervention which is the sole cause of the death. But if E had given P merely another wound, and if P had died of both wounds, the acts of D and E would have been causal confluents. The question whether both can be convicted of homicide will be studied in connection with legal causation.

Another point of some subtlety arises in connection with what is sometimes called "the risk principle." On a charge of homicide by criminal negligence, it must be shown not merely that the accused caused the death but that the death followed from the particular feature of the accused's conduct that is regarded as negligent. Thus, suppose that the accused is charged with manslaughter by negligent driving. He was driving without keeping a proper look-out or otherwise without proper care; but the deceased was a child who ran in front of the vehicle in such a way that even if the accused had been driving carefully he could not have pulled up in time. The accused is not guilty of manslaughter, because it was not his negligent driving that caused the death (*Dalloway* (1847) 2 Cox 273). It is true that the death would not have occurred unless the accused had been travelling in his vehicle at that spot at that time, but the death was not causally connected with the improper speed. The accused can, of course, be convicted of careless driving, or any other offence which does not involve the consequence of death.

Legal causation

We now turn to the rules limiting causation as a matter of law, *i.e.*, the rules discriminating between factual causes, which label some as legally operative and others as too remote. There are fewer decisions upon these rules in criminal law than in the law of tort, because criminal responsibility is subject to other limitations which make the question of remoteness of consequence less important. On a charge of manslaughter by gross negligence it must be shown that the accused should have foreseen that his act was likely to cause death and that it departed grossly from the standard of the reasonable man; if this be proved, it is not often that a consequential death will be accounted too remote. If the accused cannot be expected to have foreseen the death, his exemption from responsibility will rest not upon the remoteness of the consequence but upon absence of negligence. Take, for example, an old case where D, a seaman on a schooner, pushed off P's boat which was lying alongside, the two being engaged in a drunken quarrel. P stretched out over the bow of the boat to lay hold of a barge, to prevent the boat drifting away, and, losing his balance, fell overboard and was drowned. D was ruled not guilty of manslaughter (*Waters* (1834) 6 C. & P. 328). Although no reason is reported, it is evident that the judge did not regard a sufficient case of negligence as having been established.

Even on a charge of manslaughter by gross negligence, a question of remoteness may arise if the death occurs in an unforeseeable way. The act of the defendant may be grossly negligent because he should have foreseen that it was likely to cause death. but the death may actually have occurred in a different way or by a different chain of causation from the one that should have been foreseen. In such circumstances the defendant may sometimes be acquitted on what was called above the risk principle—even though it may not be recognised explicitly under that name. But the risk principle does not settle the problem that arises where death follows in an unforeseeable way from an injury that should have been foreseen. Suppose that D employs P to mount a ladder without warning him that the ladder is, as D knows, dangerously defective; and suppose further that D's negligence is so great that if P falls off the ladder owing to the defect and is killed, D is guilty of manslaughter. P may have a lucky escape and only cut his finger in the fall; but through negligent treatment P may come eventually to die of pneumonia. Is D guilty of manslaughter? He is guilty of gross negligence as to P's death, but not as to P's death in the circumstances in which it occurred. The problem is similar to that in *Jordan*, and the case-law upon it remains to be considered later in the article. It is mentioned at this point merely to illustrate how a problem of remoteness may arise in manslaughter by negligence.

It is being assumed in the present discussion, in accordance with the general opinion, that manslaughter can be committed by inadvertence if the negligence is sufficiently gross. A contrary opinion holds that manslaughter can be committed only by recklessness, *i.e.*, advertent negligence. It is not here necessary to consider the question.

The problem of remoteness is most likely to arise in connection with constructive manslaughter, and the way in which it is settled may well depend on the ambit given to constructive manslaughter at the present day. This question was considered in the article in [1957] Crim.L.R. 293.

Manslaughter by omission

Before considering further the ordinary cases of manslaughter, it will be helpful to get out of the way the rather special topic of manslaughter by omission. Philosophers are sometimes found to deny the concept of a negative cause, but for legal purposes it is quite possible for the absence of a factor (the presence of which would have been decisive the other way) to be accounted a cause. Supine inaction, in breach of duty, can well be a cause. Thus a parent may be guilty of manslaughter where he causes the death of his child through neglect to provide food or medical attention. In *Plummer* (1844) 1 C. & K. 600, the accused knew that his wife was very ill, but he refused to admit her into the house on a cold and wet night in November; she died shortly after. The judge ruled that the accused was guilty of manslaughter if he had caused or accelerated his wife's death by his refusal to give her shelter.

In some cases, however, the courts have declined to see a legal connection between an omission and a death. In *Rees* (1886) 104 Sess.Pap. 171, a fireman was absent from his post when a fire occurred and a life was lost. Hawkins J. ruled that there was no direct connection between the neglect of duty and the death, and the fireman was not guilty of manslaughter. The case is very shortly reported, and it does not appear whether any satisfactory evidence was given that, if the defendant had been on duty, the life would probably have been saved. However, quite apart from this point, one can understand that it would be imposing too heavy a criminal responsibility upon members of public services, such as firemen or life-boat crews, if their failure to attend for duty were capable of resulting in a charge of manslaughter. Another restrictive decision is *Pocock* (1851) 17 Q.B. 34, where it was held that trustees appointed under statute for the repair of roads were not chargeable with manslaughter when a person was accidentally killed in consequence of a road being out of repair through neglect of the trustees to contract for repairing it. To make a party guilty of manslaughter by an omission there must, said Lord Campbell C.J., be a "personal" neglect of duty and the death must be "the immediate result" of that neglect. Wightman J. required it to be "the direct consequence." Erle J. said that the neglect of duty must be "immediately connected with" the death. It is not easy to say what any of these phrases mean. The court recognised that the manager of a mine who omits to take safety precautions which it is his duty to take can be convicted of manslaughter if death results, as in *Haines* (1847) 2 C. & K. 368. Perhaps *Pocock* can be explained as an extension to criminal law of the rule in tort relating to omissions to repair the highway. Or, better, it may be said that there was not in *Pocock* a sufficiently high degree of negligence to warrant conviction for manslaughter.

The facts in *Martin* (1827) 3 C. & P. 211 presented a peculiar legal problem. D offered some gin to P, a child of four years. P twisted the glass out of D's hand and swallowed the whole of the liquor, dying in consequence. Such, at least, were the facts given in evidence and accepted by the judge. On a charge of manslaughter the judge told the jury: "As it appears that the drinking was the act of the child, the prisoner must be acquitted." Expanding this ruling slightly, it is evident from the facts as found that the accused had not administered the gin. He does not appear to have been in charge of the child, so that he was not in breach of any positive duty to look after the child. The accused might, indeed, have been found to be negligent in not controlling his glass of gin so as to prevent the child drinking it. But the judge seems to have been prepared to take the merciful view that he had been overpowered by the child and so was not in breach of duty.

Plural causation: intervening intentional acts

It is an error that has bedevilled the law of tort for many years to look for the sole cause of an event. Judges have now come to recognise that just as an event always has in fact a plurality of causes, so it may be proper to impose responsibility upon two or more actors for bringing about the concurrence of causes. Where legal responsibility would attach to one act, if it stood alone as a cause, the consequence not being too remote, it is immaterial that the consequence is in part caused by another factor in respect of which the accused is under no responsibility. For example, if D and E independently stab P, and the wound inflicted by each is enough to cause the death of P, each is guilty of murder when P dies as a result of the weakness induced by the two wounds. D is not excused of responsibility merely because E's act was later in time, his own act having contributed to the death at the moment when it occurred. E also is responsible, since it is a well-settled principle that homicide can be committed merely by hastening death. In fact that is all that any killer ever does. As *Plummer* (p. 434) shows, a person may be convicted of homicide even though his victim was already at death's door at the time of the act.

The ease with which one can fall into confusion in a problem of this kind is shown by a dictum of a North Carolina court. "If one man inflicts a mortal wound, of which the victim is languishing, and then a second kills the deceased by an independent act, we cannot imagine how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice" (*State* v. *Scates* (1858) 50 N.C. 420 at 423). The absurdity is more apparent than real. If the mortal wound had no effect on the death as it actually occurred (as where the second injury was by way of decapitation), there is no factual causation and the first offender is not guilty of homicide. His act had nothing to do with the death. But if the second act would not have killed apart from the first wound, and has the effect of accelerating the effect of the first wound, both culprits have in fact contributed to the death, and there is no reason why both should not be regarded as having caused it for the purpose of the criminal law. This opinion has in fact been accepted in the United States (see (1933) 31 *Michigan Law Review* 665). A man can, therefore, be "killed" twice.

Suppose that the first wound was not a mortal one, and that the second was not in itself a mortal one either, but both combined to weaken the victim so much that he died. Here both wounds can undoubtedly be regarded as contributing to the death as a matter of law. Whether the first striker is to be accounted guilty of manslaughter depends on the length to which the doctrine of constructive manslaughter is pressed. The doctrine of constructive manslaughter combined with the doctrine of accelerating dea is capable of producing such a tyrannous result that a court may be tempted into a somewhat illogical escape via the doctrine of causation. This is particularly likely where the second striker acted quite independently of the first. Thus: D knocks P down, and a bystander kicks P in his defenceless position, from which kick P dies. A Michigan court held in these circumstances that D was not guilty of the death, even though the death might not have been inflicted if he had not by his own act rendered the deceased helpless (*People* v. *Elder* (1894) 100 Mich. 515, 59 N.W. 237). His act was factually causative of the death, but the doctrine of legal proximity operated to rescue him from the rigour of the law of constructive manslaughter.

The English case of *Hilton* (1838) 2 Lew. 214 illustrates a similar attitude. The defendant, having the charge of a steam engine, stopped it and went away. Some unauthorised person came and set it in motion, with the result that a person was killed. It was held that the defendant was not guilty of manslaughter. Alderson B. said: "The death was not the consequence of the act of the prisoner, but of the person who set the engine in motion after the prisoner had gone away." On this it may be commented that the death was in fact contributed to by the absence of the defendant, because if he had not been away the engine could not have been meddled with. The decision can perhaps be explained as an illustration of the reluctance of the courts to find manslaughter by omission. Or it can be explained as an instance of a case where the defendant can be convicted only on proof of gross negligence, and his negligence was not on the facts sufficiently extreme to involve him in responsibility.

Intervening negligent acts

It is not clear in *Hilton* whether the stranger who started the engine intended to do mischief or not. Certainly where the intervening act is negligent rather than intentional, there is authority for saying that it does not necessarily make an injury too remote. A person who has created a dangerous situation may be responsible not only in tort but even in criminal law for a consequence that would not have ensued if other persons had not subsequently been negligent. And this even though he did not intend to do any harm whatever. Such, at any rate, appears to be the result of the ruling in *Benge* (1865) 4 F. & F. 504. The accused was foreman of a gang of plate-layers, and owing to a negligent misreading of the time-table he ordered the rails to be taken up although a train was due before they could be replaced. When rails were taken up, it was usual to send one of the gang as a signalman forward; he was to go at least 1,000 yards in the direction in which the expected train was to come, and to signal to it with a flag; the signal would be seen at above 500 yards, and thus give ample time to stop the train. On this occasion Benge sent a signalman forward, but (*a*) he went only 540 yards and (*b*) the engine-driver was not keeping a very sharp look-out and did not see the signal in time to stop. There was a fatal accident. The train could have stopped in 1,000 yards, so that if either negligence (*a*) or negligence (*b*) had been absent there would have been no accident. Benge was nevertheless convicted of manslaughter, his negligence in mis-reading the time-table being a substantial cause of the accident. This conviction for an inadvertent slip seems to have been somewhat harsh, and it still cannot be regarded as finally settled that the law of manslaughter is appropriate to a case of pure inadvertence. Much the greater share of responsibility lay at the door of the signalman and engine-driver, each of whom must have realised that he was not complying with the safety rules; particularly was this so in the case of the signalman.

The defendant in *Ledger* (1862) 2 F. & F. 857 was luckier than Benge. He, too, worked on the railway, being a porter whose duty it was to start the trains. In breach of a rule, he started trains within less than five minutes of each other; but there would have been no accident were it not for subsequent confusion on the part of the signalmen. Ledger was acquitted of manslaughter in respect of the death of a passenger. Although the direction does not distinguish between factual and legal causation, it is a possible view that Ledger's breach of duty was not even a factual cause of the accident; for it may well have been that the signalmen would have brought about the accident even if the trains had been properly despatched. If this is so, the case does not turn on remoteness, but is a simple application of the requirement of factual causation.

The possibility of plural causation is sometimes obscured by the way in which the question of causation is left to the jury. Where the defence is that the death was contributed to by some factor in addition to the defendant's wrong, the jury are sometimes required to answer which factor was "the" cause of the death. It may be that in ultimate analysis questions of legal causation are incapable of being answered except in some impressionistic way, and that this formula is as good as any other for leaving the issue to the common sense of the jury. Yet it is a confession of failure on the part of the lawyer if he is unable to give guidance on the operation of a legal rule of great importance. There would at least be the beginning of analysis if the jury were instructed on the difference between factual and legal causation.

The way in which questions of constructive manslaughter, gross negligence and causation become interwoven is further illustrated by *Bennett* (1858) Bell 1. The defendant made fireworks contrary to a statute of 1698, which was passed to forbid the making of fireworks except for the use of the armed forces. The preamble recited that much mischief had happened by throwing and firing of fireworks, and it was evidently to eliminate this mischief that the statute was passed. What happened was that the defendant had combustible ingredients on his premises which he used in the manufacture of his fireworks, and during his absence, through the negligence of his servants, a fire broke out among these ingredients. A rocket, becoming ignited, flew across the street and set fire to a house opposite, causing the death of a person therein. The Court for Crown Cases Reserved held the defendant not guilty of manslaughter. Cockburn C.J. said: "The keeping of the fireworks did not alone cause the death; plus that act of the defendant, there was the negligence of the defendant's servants." Willes J. expressed himself similarly. "The fire which caused the death did not happen through any personal interference or negligence of the defendant. The keeping of the fireworks in the house was disconnected with the negligence of the defendant's servants which caused the fire."

With all respect, it is not easy to accept this as a correct basis of the decision. Factually, the negligence or breach of duty of the defendant did contribute to the accident. Nor is it necessary as a matter of law that the death should be the result solely of the negligence of the defendant. Regarded as a limitation upon the law of constructive manslaughter, however, the decision is to be welcomed. It might have been held that the statute was irrelevant to the case, because the statute was passed to prevent mischief arising from the deliberate lighting of fireworks, and it was only with this end in view that it forbade their manufacture. The statute was not passed because of risks incidental to the manufacture of fireworks. Alternatively, it might have been held that the doctrine of constructive manslaughter did not apply where the illegal act of which the accused was guilty was not an intentional wrong to the person. This, at any rate, appears to be the position at the present day. If the doctrine of constructive manslaughter is put out of the case, the accused could be convicted only on proof of gross negligence causing the death. There was lacking any evidence that the defendant negligently conducted his business, or that he should have foreseen the death which happened. From this point of view there was no need to refer to the doctrine of legal causation; his acquittal could have been rested simply upon the absence of the necessary degree of negligence. Even if the object of the statute was to repress the manufacture of fireworks on account of dangers incidental to the manufacture, society could surely have been adequately protected by prosecuting for a breach of the statute in accordance with its terms.

(To be continued) page 510

Mr. Sutterthwick's Court

By A. E. JONES, *Magistrates' Clerk*

Cross Assaults

On one of the long benches in the waiting hall sat an elderly couple; on the bench furthest away from them sat a young couple and a middle-aged woman. There was no one else present to make less obvious the division between the two families, for they represented the last case in Mr. Sutterthwick's list that day and no one but themselves was sufficiently interested in it to stay so late. Sergeant Quing, the warrant officer, opened the door leading to the court room, and for what seemed to them the hundredth time that afternoon their heads turned hopefully in his direction. On this occasion it really was their turn. "Lily Manners; Sarah Brotherton," read Sergeant Quing from a sheet of paper. The female half of both the young and the elderly couple got up. "Emily Manners; Sarah Brotherton," he continued, and the middle-aged woman got up. "Lily Manners; George Brotherton. Emily Manners; George Brotherton," he went on more quickly, and the elderly man joined the standing women. It was the young man's turn to rise as "Sarah Brotherton; Herbert Manners" and "George Brotherton; Herbert Manners" were called. After this, the warrant officer's final announcement, "Sarah Brotherton; Emily Manners. Sarah Brotherton; Lily Manners" seemed superfluous, as everybody was now accounted for; but it was his duty to give due publicity to the court's proceedings by reading out the names of the parties in every summons in the list—complainant first, then defendant.

As Sergeant Quing lined up in front of the dock the five persons concerned in the eight summonses, Mr. Tarkaway rose from the solicitors' seats and said: "I appear for Mr. and Mrs. Manners and Mrs. Manners, senior, sir. My friend, Mr. Bengeham, appears for the Brothertons. We agree to the cases being heard together. They all appear to arise out of the same incident." Mr. Tarkaway had made similar announcements on many previous occasions. He and Mr. Bengeham were frequently engaged to play their present roles when neighbours living too close together were exasperated into the sort of conduct which was usually described as " taking a liberty " or " calling me out of my name."

" Everybody's not guilty of everything, I suppose? " said Mr. Sutterthwick, but he did not sound optimistic.

" That's how my clients plead " said Mr. Tarkaway firmly.

" So do mine " said Mr. Bengeham with equal firmness.

" I see Lily Manners is the first complainant, according to my register," said the magistrate. " She'd better come into the witness-box."

" Yes," said Mr. Tarkaway, with a note of triumph in his voice: " She and her mother-in-law were the first to come to the court. I would ask you, sir, to take note of the fact that the Brothertons only applied for their summonses after they had been served with the summonses taken out by my clients."

" My clients are not of a vindictive disposition," remarked Mr. Bengeham virtuously. " They would have been willing to overlook the matter and let bygones be bygones."

" In view of what they did to my clients they would, no doubt, have been well satisfied if no action had been taken to bring them to justice," rejoined Mr. Tarkaway.

" You will hear in due course, sir, of the injuries sustained by Mr. and Mrs. Brotherton and you will be able to judge then who should be brought to justice," said Mr. Bengeham with dignity.

" Yes, I shall be able to judge when I have heard the evidence," said Mr. Sutterthwick. " So the sooner we get to it the better—much as I enjoy listening to you two gentlemen."

The case for the first complainant

" I need not detain you long in opening the case, sir," said Mr. Tarkaway. " It is one of those cases, unfortunately all too familiar to you, where the parties all live in the same house. My clients have been tenants of the first floor for some five years but the Brothertons only moved in about twelve months ago. They occupy the ground floor and, for some time past, they seem to have set out deliberately to make the lives of my clients a misery. You may think it is not without significance, sir, that Mr. and Mrs. Brotherton have a married son who is anxious to get a flat in this district. It would no doubt be very convenient for them if the Manners could be driven out of their first floor flat. . . ."

"My friend has no right to suggest such a thing" interposed Mr. Bengeham indignantly. "My clients have absolutely no designs on the part of the premises occupied by the Manners. All we want is to be allowed to enjoy our own part of the premises in peace and quiet. The insinuation made by my friend is absolutely unfounded and should not have been made; he knows very well he has no evidence to support it."

"Even if he had it wouldn't be admissible" said Mr. Sutterthwick. "Wouldn't it be better, Mr. Tarkaway, if we came to what I'm concerned with—the alleged happenings on (he consulted his register) last Sunday week."

"As you please, sir; I just wanted to give you the general background of the case," said Mr. Tarkaway, quite unruffled by his friend's unfriendly remarks. "Things came to a head on the day in question when the younger Mrs. Manners's baby was ill in bed with bronchitis—as the Brothertons well knew. In spite of this they saw fit to leave the back door wide open so that an icy draught came up the stairs and into the bedroom where the sick child lay. Naturally the child's mother called downstairs and asked for the door to be shut. She made her request quite politely but Mrs. Brotherton responded with what I can only call a torrent of foul-mouthed abuse. Mrs. Manners junior then went downstairs to explain why it was necessary to keep the door shut, but no sooner had she reached the bottom of the stairs than she was set upon by Mrs. Brotherton, without warning. My client's hair was pulled and her face scratched in this unprovoked assault. She was in no condition to defend herself as she is still weak following childbirth (which was a difficult one) and so naturally she screamed for help. Mrs. Emily Manners, hearing this, hurried downstairs and tried to drag her daughter-in-law away from Mrs. Brotherton. Mrs. Brotherton thereupon turned her attentions on Mrs. Manners senior and proceeded to strike her several blows in the face. Eventually the two ladies who are my clients managed to get away and they retreated upstairs to their own flat and shut the door. A few seconds later, however, the door was burst open and the Manners's kitchen was invaded by Mrs. Brotherton together with her husband who had brought a hammer with him. A sort of general scrimmage ensued in the course of which various objects in the kitchen—including a bag of flour—were thrown at the two Mrs. Manners, and they each received blows on the head from Mr. Brotherton's hammer. My other client, Mr. Herbert Manners, was awakened from his Sunday afternoon nap by the noise of the attack on his wife and mother. He went into the kitchen—after first donning a few necessary garments—and eventually managed to obtain possession of the hammer, and to get the Brothertons out of his flat. I presume that these actions of his account for the summonses taken out against him for assault; but I think, you will be satisfied, sir, that he used no more force than was necessary to eject these trespassers. . . . I'll call my first witness."

The first witness

Lily Manners was sworn and Mr. Tarkaway engaged himself in the task of restricting her evidence to what was relevant. It was not long before she burst out with "Can I tell my story in my own way, sir."

"It will be better if you just answer your solicitor's questions," said the magistrate. "He knows what's evidence better than you do."

"I only want to make you realise, sir, the sort of hell we've been living in this last year, through these people," said the witness vehemently.

"Now calm yourself, Mrs. Manners; you won't do yourself justice if you get excited," said Mr. Tarkaway severely.

Disheartened by this apparent desertion even of her own champion, Lily Manners gave up struggling against the mysterious processes of the law; and Mr. Tarkaway was able to extract from her very nearly the same story as appeared in his instructions.

Mr. Bengeham rose to cross-examine. His technique in this difficult art was an uncomplicated one: he simply read out his brief bit by bit and invited comments from the witness. Sometimes this procedure resulted in a spark being struck which caused some illumination to be cast on the subject under investigation; occasionally, indeed, it lit a conflagration which consumed Mr. Bengeham's case entirely; more often than not it produced only smoky haze over the issues involved. Still, nobody could ever say that Mr. Bengeham had failed to put to a witness all that the other side was going to say about that witness.

The story which he now began to unfold to Mrs. Lily Manners was a sort of photographic negative of her own version in which all the whites had become blacks. According to Mr. Bengeham's instructions, Mrs. Manners junior first shouted down very offensively for an obscene door to be obscenely shut, then spoke in a similar strain of Mrs. Brotherton and finally rushed down the stairs, took off one of her shoes and used it as a weapon to belabour the older woman. When Mrs. Brotherton attempted to defend herself, Mrs. Lily Manners shouted up the stairs "Come on, Ma, and help finish her off," whereupon Mrs. Emily Manners hastened down and joined her daughter-in-law in the attack, pulling Mrs. Brotherton's hair and scratching her face. The two Mrs. Manners then dragged Mrs. Brotherton up the stairs and into their kitchen—presumably, suggested Mr. Bengeham, to " finish her off." Mr. Brotherton, who was doing a little carpentry job, heard his wife's screams, and naturally went immediately to investigate. He left what he was doing in such haste that he still had a hammer in his hand, but it was never in his mind to use it as a weapon and he did not do so. All his efforts were directed to getting his wife away from the Manners's kitchen; however, his attempts to part the women were frustrated by Mr. Herbert Manners who came on the scene stripped for the fray and proceeded to pummel both Mr. and Mrs. Brotherton unmercifully. Finally the older couple—almost in a state of collapse—managed to struggle out of the room and get back to their own quarters.

This narrative brought forth from the witness mainly " No I never," " No, nothing of the sort," " I don't know what you're talking about," and " Oh, what wicked lies." But she did concede at one stage that her shoe came off in the struggle and naturally she picked it up and it probably would have been in her hand when she was trying to defend herself and it might accidentally have come into contact with Mrs. Brotherton's face through that lady running against it while she was acting like a mad thing.

Pursuing his policy of leaving nothing out, Mr. Bengeham came next to the open back door which provided the only point of agreement between the parties inasmuch as both sides gave it as the starting point of the trouble that afternoon. Mr. Bengeham put it to the witness that the zeal for ventilation shown by the Brothertons was inspired solely by the need to dry out their kitchen after it had been made almost uninhabitable by reason of water dripping through the ceiling in such volume that it could only have been due to gross carelessness or deliberate malice on the part of the upstairs tenants. The suggestion brought an emphatic denial from Lily Manners.

" Don't you know," inquired Mr. Bengeham, " That the Brothertons had to call the sanitary inspector in because of the state of their kitchen and he said. . . ."

" I must object to that," interrupted Mr. Tarkaway; " Unless, of course, my friend intends to call the sanitary inspector as a witness."

" I certainly do not," snapped Mr. Bengeham.

" What the sanitary inspector said would, I think, be rather like what the soldier said in another case—not evidence," remarked Mr. Sutterthwick.

"I realise that," said Mr. Bengeham; "Even if my friend doesn't. That is why I had no intention of calling him here."

"Then my friend shouldn't have referred to him," said Mr. Tarkaway.

"I won't let it influence my mind in any way," promised Mr. Sutterthwick, and added, "It seems to me, Mr. Bengeham, that your cross-examination has covered all the relevant matters adequately now."

"Yes, I think it has, sir," said Mr. Bengeham, after glancing rapidly through his brief.

The second witness

Mrs. Emily Manners, the next witness, supplied, in answer to Mr. Tarkaway's questions, a very similar account to that given by her daughter-in-law. So much so that, until Mr. Bengeham objected, she was proceeding to give a detailed description of what had happened before she came on the scene. Like the previous witness, she was also anxious that the magistrate should understand "what it was all about"—even to the extent of wishing he could live in the house for a bit to see for himself the dance the Brothertons led them. "They even grumble when the baby cries—as if they weren't babies themselves once," she added indignantly before her evidence could be diverted into orthodox channels.

In due course Mr. Bengeham read his instructions to her but nothing much came of it for the clerk's notes of evidence, except a guarded admission that, in self-defence—and only after she had been attacked first—she might possibly have hit back at Mrs. Brotherton. "You'd have done it yourself," she assured her cross-examiner, and was promptly called to order by the magistrate.

Mr. Herbert Manners, the last witness called by Mr. Tarkaway, provided a masculinely laconic version of his share in the proceedings, hedged with an entanglement of "if you understand me," "as the saying is," and "sort of, you know." He grudgingly conceded to Mr. Bengeham the likelihood that, in the course of getting possession of the hammer and ejecting Mr. and Mrs. Brotherton, his hands came into contact with some portions of their anatomies, but he was emphatic that nothing in the nature of a blow was struck by him.

The case for the Brothertons

With the first innings closed Mr. Bengeham proceeded to open for the other side. He remarked that he had sufficiently indicated by his cross-examination what his clients' version of the incident was, and, therefore, he would not waste the magistrate's time with a lengthy address. He did, however, wish to draw attention to the age and physique of the Brothertons. They were before the magistrate and he could judge for himself whether they looked the type to seek or provoke a fight. Mr. Brotherton was sixty-four years old and suffered so badly with his chest that he was a semi-invalid. Mrs. Brotherton was rather younger than her husband but, of course, very much older and less active than Mrs. Manners junior; and her health was not good either. Mr. Bengeham confidently asked the magistrate to say that all the probabilities were against Mrs. Brotherton having been the aggressor and were in favour of Mr. Brotherton's intervention having been merely an attempt to rescue his wife from an unjustified and vicious attack made on her by two much more vigorous women.

Mrs. Brotherton, like the other female witnesses, was eager to put the happenings of Sunday against a background of the character and habits of her neighbours. By the combined efforts of Mr. Bengeham, Mr. Tarkaway, the magistrate and clerk, she was finally headed away from the filthy, quarrelsome ways of the Manners, what the sanitary inspector had said about them, how they neglected their baby, and the lengths they went to make life wretched for their downstairs neighbours. But when her solicitor eventually got her to the point where young Mrs. Manners had shouted down for the door to be shut, she shied violently. "Can I swear in court, your worship?" she demanded dramatically.

Mr. Sutterthwick realised that she was not just seeking permission to relieve her feelings. "We're used to all sorts of language here," he said encouragingly.

Mrs. Brotherton drew a deep breath and began, "Well, I'll tell you; she called me a . . ." but here her resolution failed and she concluded, "Oh no, I couldn't. Not with all these gentlemen present. Can I write it down, please?"

At the magistrate's direction Sergeant Quing supplied the witness with pencil and paper, and, for what seemed an age, she laboured with them. Finally Mr. Sutterthwick said, somewhat impatiently, "Well, I think there should be a fair sample down by now." The paper was handed to him and then passed for inspection to the two advocates and the clerk. On it was written "She caled me a noare and a barsted."

"I've heard worse, and seen it spelt more strangely," commented Mr. Sutterthwick.

With this hurdle surmounted Mrs. Brotherton's evidence fairly galloped along, and Mr. Bengeham was soon able to hand her over to Mr. Tarkaway satisfied that she had fully come up to her proof. She faced Mr. Tarkaway as if he were himself a member of the Manners clan and was so determined to have nothing to do with any suggestion he might make that, several times, she gave him an emphatic denial before he was halfway through his question. She was certain that she never laid hands on either of the other two ladies—not even accidentally. She was equally certain that she had not thrown anything at them in their kitchen ; in fact, according to her, nothing was thrown by anybody.

" Not even a bag of flour?" queried Mr. Tarkaway. " Are you seriously saying that there wasn't flour all over the place? Have the Manners imagined that?" Yes, they were telling lies about it, the same as they did about everything else ; the witness never saw any flour about.

Mr. Sutterthwick disapproved of jokes from the bench, but he had had a long afternoon and he was a little off his guard. Before he quite realised he was speaking aloud, he found himself saying, " It must have been self-erasing flour."

" No, it wasn't, sir. It was plain flour," spoke up Lily Manners from her seat in front of the dock.

Mr. Tarkaway and Mr. Bengeham grinned covertly at each other ; and the magistrate reflected that his remark had deserved no better fate.

The last witness

Mr. Brotherton was the last witness, and valiantly he strove to infuse some fresh life into what had become a rather tired case by colourful references to being " black and blue all over," to " pouring with blood," and to finally " going into a sort of daze in which he was able to think, 'Thank Gawd the blows don't hurt so much.' " Mr. Tarkaway's persistence in questions about the hammer brought its reward when the witness conceded that he might just have tapped the two Mrs. Manners on the head with it —very, very gently—in order to make them let go of his wife. " And didn't you give Mr. Manners a tap on the head too, before he could take the weapon away from you?" pursued Mr. Tarkaway.

" I must object to that question," said Mr. Bengeham, rising indignantly. " There's no summons against this witness for assaulting Herbert Manners."

" If my friend would refrain from interrupting and let me conduct my case in my own way, he would see the relevance of my question," said Mr. Tarkaway cuttingly.

"My friend is not entitled to put to my client a suggestion that he has committed some other offence with which he is not charged—as he well knows," retorted Mr. Bengeham, equally cuttingly.

"Perhaps I should put my question in another way—in order not to embarrass my friend," said Mr. Tarkaway.

"I must say that I think all the ground in this case has been very thoroughly explored already," said Mr. Sutterthwick with his eyes on the clock which faced him on the back wall of the court.

"Very well, sir; I won't ask any further questions—so long as it is understood that I am not accepting the evidence of this witness," said Mr. Tarkaway.

George Brotherton left the witness-box and Mr. Sutterthwick said "Well, this case seems to be an issue of fact for me. I take it that neither of you two gentlemen wishes to address me further?" The two solicitors acquiesced without demur; they both had conferences fixed for that afternoon.

Judgment

"In this case," said the magistrate, "I've heard two entirely different stories about the same period of time. One thing is certain: this was not a pleasant Sunday afternoon. I think that each side has told lies about it—when the truth was embarrassing; and each side has told that part of the truth which suited it to tell. On the evidence as a whole I'm satisfied that Lily Manners attacked Mrs. Brotherton first. I think Mrs. Brotherton defended herself vigorously and so Emily Manners was called up as a reinforcement and joined in the assault on Mrs. Brotherton. I don't believe that that lady was dragged upstairs; the Manners wouldn't want a disturbance in their own kitchen, and it's obvious that the Brothertons went in there uninvited and bent on vengeance. In the ensuing fight I've no doubt that, with the help of Mr. Brotherton's hammer, the invaders had the better of it until a strategic reserve in the person of Herbert Manners arrived on the scene. I think his intervention went beyond merely separating the combatants and ejecting the trespassers. I find that he used more force than was necessary and was therefore guilty of assaulting Mr. and Mrs. Brotherton. That means I find all eight charges of assault proved. Mrs. Lily Manners must pay a fine of twenty shillings because she started the whole affair. I shall fine George Brotherton twenty shillings as well because I must discourage the use of weapons in these disputes. I don't think it necessary to impose any other fines but all parties will be bound over in the sum of five pounds to be of good behaviour for the next twelve months. I hope there will be no more of these disgraceful disturbances. Don't forget, each of you has five pounds at stake if he or she breaks the peace in the next twelve months. So try and live together as reasonable neighbours in future."

"You can't do it with them, sir. They're too ignorant," said Mrs. Brotherton, passionately.

Sergeant Quing escorted the parties from the court room using his substantial frame to prevent contact between the two families. Mr. Tarkaway and Mr. Bengeham left by another door, amicably discussing the next case in which they were professional opponents.

Previous Convictions as Evidence of Similar Facts

By E. C. D. Thorp, LL.B.

There has been much discussion in recent years about the principles governing the admissibility of evidence of similar facts in criminal cases, and although no case of comparable importance has arisen since *R.* v. *Straffen* [1952] 2 Q.B. 911, the topic is still a very live one.

Such evidence usually consists of proof of similar conduct by the accused, on other occasions, which tends to establish his guilt of the crime charged against him. Such conduct may be the subject of other charges joined in the same indictment, as in *R.* v. *Sims* [1946] K.B. 531, or it may not be the subject of any charge and be introduced as relevant evidence on its own merits. Very occasionally, it may have been the subject of a previous charge and conviction, but the cases in which similar fact evidence of this kind has been introduced are so few and of such a nature that the attitude of the courts on the matter remains somewhat doubtful.

It has been customary in the past to distinguish between evidence of character, previous convictions and conduct on other occasions on the ground that different principles apply in each case. In *R.* v. *Rowton* (1865) 34 L.J.M.C. 57 the Court for Crown Cases Reserved laid it down that evidence of the bad character of an accused person must be confined to evidence of his general reputation only, and not of particular acts or actions. In *R.* v. *Butterwasser* [1948] 1 K.B. 4, Lord Goddard C.J. remarked that nowadays evidence of character was very loosely received, and that it was as well that courts should be reminded of the principles laid down in *Rowton*. In fact, it has been accepted practice for many years that in a case where evidence of the bad character of an accused person becomes admissible, proof of his previous convictions may be given. It is immaterial whether this be for the purpose of rebutting the accused's evidence of his own good character or to prove the charge against him, for example, loitering with intent under the Vagrancy Act, 1824, where the "known character as proved" of the accused may be given to prove his intent to commit a felony, by virtue of section 15 of the Prevention of Crimes Act, 1871. The only statutory provision which specifically authorises proof of previous convictions to establish a prisoner's guilt is section 43 of the Larceny Act, 1916, on a charge of receiving stolen property.

It is probably true to say that general opinion in the past has been that it would not be permissible to put in evidence of the previous convictions of an accused person to prove a charge except under statutory authority. Similar fact evidence tending to show that an accused has committed other offences than those with which he is charged may be, and frequently is, admitted, but evidence that he has been convicted of such other offences would normally be regarded as inadmissible.

Section 1 (*f*) of the Criminal Evidence Act, 1898, provides that:

> "A person charged and called as a witness . . . shall not be asked any questions tending to show that he has committed or been convicted of . . . any offence other than that wherewith he is charged . . . unless—
>
> (i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is charged;"

For present purposes it suffices to say that this provision accepts the existence of circumstances in which the previous convictions of an accused person may be admissible evidence to prove his guilt, although the Act is silent about what those circumstances may be. Are there any, apart from those provided for by statute? Let us see whether a clear answer can be derived from an examination of the relevant cases.

Time of previous conviction

R. v. *Tomasso* (1934) 25 Cr.App.R. 14 seems to be the first case in which the question was raised. The appellant had been convicted at the Central Criminal Court of possessing counterfeit coins with intent to utter them, under section 11 of the Coinage Act, 1861.

The indictment contained another count charging him with committing the offence after a previous conviction for the same offence, but this had not been proceeded with. The appellant had given evidence on his own behalf, and in his examination-in-chief admitted possession of the coins knowing them to be counterfeit, but said he had taken them deliberately in order to obtain evidence against another person and for the purpose of informing the police. He did not put his character in issue. In cross-examination, it was put to him that in 1926 he had pleaded guilty to possessing counterfeit coin, and he admitted the conviction. On appeal, it was argued on his behalf (a) that there could be no nexus or relationship between a previous conviction in 1926 and a similar charge in 1934, and (b) that in any event there was a distinction between former conduct tending to show guilty intent and a previous conviction. For the Crown it was contended that the evidence of the previous conviction went to show a guilty design or to rebut a defence of mistake, and that as the evidence of a previous incident of possessing counterfeit coin would have been admissible, the question about a previous conviction for a similar offence was admissible under section 1 (*f*) (i) of the Criminal Evidence Act, 1898. The Court of Criminal Appeal allowed the appeal and quashed the conviction. The judgment, however, was a very short one, and the court gave no clear indication whether it was the fact that the conviction for the previous offence took place eight years before, or the fact that the conviction had been mentioned at all which led to the appeal being allowed. Lord Hewart C.J. dealt with the point at issue in these words:

> " When he (the appellant) went into the witness-box to give evidence on his own behalf he was cross-examined about a previous conviction which took place eight years ago. . . . In our opinion that question was clearly improper and vitiates the conviction which followed."

Less than a year later came the case of *R.* v. *Porter* (1935) 25 Cr.App.R. 59. The appellant had been convicted of obtaining money by false pretences, arising out of a business carried on by him. The false pretence alleged was that he had falsely represented his business to be a bona fide association honestly carried on, and in a position to offer advantages in return for subscriptions of members. At the trial, the appellant did not dispute that the persons alleged to have been defrauded had been induced to part with their money by reason of his representations, and the essence of his defence was that he had no intent to defraud. In 1930 he had carried on a similar business and made similar representations as a result of which he had been tried and convicted in 1931 for obtaining money by false pretences. In cross-examination he was asked a number of questions about the previous similar business carried on by him, although no reference was made by prosecuting counsel to any previous charge or conviction. In the course of the questions, however, the appellant himself referred to his previous conviction.

The appeal was based solely on the ground that questions to the appellant about the previous business were inadmissible, particular reliance being placed on the period of time (actually about two-and-a-half-years) between the end of the appellant's first venture and the beginning of the second. Counsel for the appellant also contended that although the previous conviction was not specifically put to the appellant, the questions tended to show that he had committed a previous offence and thereby offended against section 1 (*f*) of the Criminal Evidence Act.

The Court of Criminal Appeal held that the questions and evidence about the previous business were admissible and dismissed the appeal. Avory J., who delivered the judgment of the court, pointed out that part of the period between the two businesses had been spent by the appellant in prison, and that the remarkable similarity in method adopted by the appellant in each case was sufficient justification for admissibility on the issue of intent to defraud. In referring to the mention of the previous conviction, he said:

> " Unfortunately the appellant, not content with answering the questions put to him, himself introduced before the jury the fact that he had been convicted of obtaining money by false pretences in 1931. The prosecution are not responsible for that."

Porter's case is, therefore, clear authority for the principle that the facts of a previous charge which has resulted in a conviction may be introduced as similar fact evidence, given the necessary nexus between the two sets of circumstances. It is a matter for conjecture whether the decision would have been the same if the prosecution had been responsible for introducing evidence of the previous conviction of the accused.

R. v. *Marsh*

The question arose again in a different form in *R.* v. *Marsh* (1949) 33 Cr.App.R. 185. In this case the appellant had been tried at assizes before Lord Goddard C.J. on a charge of carnal knowledge of a child of eight. The child was the daughter of the appellant's wife by another man. At the trial, for the purpose of corroborating her evidence, the prosecution were permitted to call evidence that eighteen months before, at a time when the appellant, the child and her mother had been living in the same house, the appellant had confessed to, pleaded guilty to, and been sentenced for an indecent assault on the same child. The appellant's defence was an alibi.

It appears from the judgment from the Court of Criminal Appeal that on the appeal counsel for the appellant at first urged that the evidence about the previous conviction was inadmissible, but later conceded that on the authorities it was admissible, and relied simply on the contention that it had such small probative value that it should have been excluded by the trial judge. The authorities relied upon in argument by the prosecution were *R.* v. *Ball* [1911] A.C. 47, *R.* v. *Shellaker* [1914] 1 K.B. 414, and *R.* v. *Hewitt* (1925) 19 Cr.App.R. 64. None of these cases involved the proof of a previous conviction against the accused, but there is nothing to show that this point was expressly taken by counsel for the appellant.

Giving the judgment of the court dismissing the appeal, Oliver J. said that there was no question that the evidence was admissible; the real principle was laid down in *Ball,* where evidence of previous association between a brother and sister was held admissible as tending to prove a guilty passion between them on a charge of incest. In the present case the Lord Chief Justice had admitted the evidence for the purpose of showing a guilty lust.

The surprising thing about this case is the ease with which the court reached the conclusion that the evidence about the previous conviction was admissible. The only essential difference from *Tomasso,* in which a question about a previous conviction of the accused was rejected as " clearly inadmissible " was the interval of time, in *Tomasso* eight years, in *Marsh* eighteen months, between the previous conviction and the offence for which the accused was tried. The two cases would be easier to reconcile if it was clear that the long interval of time was the reason for the decision in *Tomasso.* As already indicated, it is by no means clear that this was so. Again, although in *Porter* the Court of Criminal Appeal felt no difficulty about admitting questions about the facts of a previous charge resulting in a conviction, they regarded it as " unfortunate " that the conviction itself had been mentioned.

Rebuttal of defence that action was involuntary

The next case for consideration is *R.* v. *Harrison-Owen* (1951) 35 Cr.App.R. 108. The facts were that the prisoner had been found in a dwelling-house early one morning. At his trial for burglary he pleaded by way of defence that he had no recollection of entering the house and must have done so in a state of automatism, and he gave evidence to this effect. The trial judge, Stable J., thereupon directed counsel for the prosecution to put to the prisoner a number of previous convictions for larceny and housebreaking after ruling that the essence of the prisoner's defence was that his presence in the house was accidental and not intentional.

The Court of Criminal Appeal allowed the appeal in this case, and quashed the conviction. Delivering judgment, Lord Goddard C.J. said the prisoner's real defence was that his presence in the house was involuntary, and there was no authority for the admissibility of previous convictions to rebut such a defence.

The actual *ratio decidendi* of the decision appears to be that the previous convictions of the accused for crimes similar to that for which he is being tried are not admissible to rebut a defence that what he did was involuntary and unintentional, as distinct from a defence that it was accidental. Lord Goddard was at some pains to make this distinction in relation to the facts of the case, and it seems a reasonable assumption that had the defence been one of accident the court would have been prepared to hold that the evidence as to the convictions was relevant and admissible. No direct reference was made as to the propriety of proving previous convictions as such, although Lord Goddard may have had this in mind when he referred, at p. 111, to the " remarkable state of affairs " which would arise if the trial judge's ruling was held to be correct.

Evidence of identity

The case of *R.* v. *Straffen* [1952] 2 Q.B. 911 did not, of course, involve the proof of a previous conviction for murder against the accused, as he had been found unfit to plead when he appeared at his first trial. The similar fact evidence in that case consisted of proof of a confession by Straffen to the two earlier murders, coupled with proof of the circumstances of the killings, which bore so remarkable a resemblance to the later one for which he was tried and convicted. The interesting remarks made *obiter* by Slade J. who delivered the judgment of the Court of Criminal Appeal dismissing Straffen's appeal, may, however, be recalled; he said:

> " Speaking for myself, if the question of identity arose in a case of housebreaking and it was possible to adduce evidence of some peculiarity in relation to earlier housebreakings which was apparent also in the case of the housebreaking charged, so as to stamp the accused man not only with the housebreaking charged but with the earlier housebreakings, and there was

> evidence that he had committed the earlier housebreakings, that would fall within the same principle of admissibility, not to prove his propensity for housebreaking, but to prove that he was the person who committed the housebreaking charged."

The implication here is that the previous convictions of an accused for offences of housebreaking in which a distinctive *modus operandi* had been used could well be admitted to establish his identity as the person responsible for a later offence involving the same *modus operandi.*

Evidence of previous charge

What conclusions may be drawn from the cases to which reference has been made? It will be observed that the courts have declined to lay down any general principles on the admissibility of previous convictions as similar fact evidence. It might, perhaps, be truer to say that they have not regarded the matter as involving any special issue of principle at all, and have preferred to decide each case entirely on its own merits. On this basis, therefore, it would seem that if the previous acts or conduct of an accused person are relevant to a charge against him, it is immaterial that he may have been previously charged and convicted in these cases. The cases of *Tomasso* and *Harrison-Owen,* in which evidence of previous convictions was held to be inadmissible are capable of being explained not on the ground of objection to evidence of previous convictions as such, but on the ground that in each case the evidence was not relevant to the issue.

Normally, of course, it will be the facts of the previous charge, what the accused was proved to have done on that occasion, that will be relevant, rather than the previous conviction. If it is possible to adduce evidence of the facts without bringing in the previous conviction, as the prosecution did in *Porter,* so much the better. But where, as in *Marsh*, the evidence is of a previous charge to which the accused pleaded guilty this can hardly be done.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by HENRY PALMER, *Barrister-at-Law*

Supervision order

In R. *v.* PERKS, the court (Lord Goddard C.J., Hilbery and Streatfeild JJ.: April 15, 1957) quashed a supervision order under section 22 of the Criminal Justice Act, 1948. P., who was a man of twenty-eight years of age, had been convicted at quarter sessions of three offences of office breaking and larceny and one offence of housebreaking and larceny. He applied to the court for leave to appeal against conviction. The court, dismissing the application, stated that it had emerged that P. had been served with a notice of previous convictions in order to support an order made by the sessions under section 22 of the Criminal Justice Act, 1948. That notice was bad because the first offence set out was not one for which the offender had been sentenced to Borstal training or imprisonment as required by section 22. The court considered it necessary to treat the application as though there were an application in respect of sentence and to quash the supervision order.

Borstal training

In R. *v.* TILTON, the court (Byrne, Slade and Barry JJ.: May 27, 1957) dismissed an appeal against a sentence of Borstal training. T. had pleaded guilty at quarter sessions to two offences of housebreaking and larceny, one of pavilion-breaking and larceny, and nineteen other offences were taken into consideration. T., who was a boy of nineteen years of age, had one previous conviction in January, 1957, when he had been fined for taking and driving away a motor-car and using it without insurance. The probation officer had reported that T. had good potentialities but that he gave up easily in adversity. The Prison Commissioners had reported that T. did not appear to have reached the stage where a long period of discipline and training would be expedient for his reformation. The court stated that, although they were not bound by the Prison Commissioners' report, considerable attention was always paid to it. It was one of the factors to be weighed up in deciding what was the appropriate course to be taken. It appeared to the court that, in the circumstances, the sentence passed was a proper one.

In R. *v.* BRYAN, the court (Byrne, Slade and Barry JJ.: May 20, 1957) varied a sentence of Borstal training to one of imprisonment for twelve months. B. had been convicted of store-breaking. He was a man of twenty years of age and had four previous convictions for dishonesty. In 1954 he had been fined for stealing a motorcycle, and in 1955 he was dealt with for taking and driving away a motor-cycle and also for seven thefts. During his national service in 1955 he had been sentenced to three months' imprisonment six times concurrently for taking and driving away two motor-cycles and for stealing. In July, 1956, he had been sentenced to six months' detention for robbing a coin meter. The court stated that, having regard to B.'s record, the appropriate sentence was one of imprisonment rather than Borstal training.

In R. *v.* BULL, the court (Lord Goddard C.J., Hilbery and Streatfeild JJ.: April 15, 1957) varied a sentence of Borstal training to one of imprisonment for twelve months. B., who was a married man of nineteen years of age, had pleaded guilty at quarter sessions to indecent assault. The facts were that B., walking home from a public house at night, was walking with a respectable married woman. He then tried to kiss the woman, pushed her to the ground and put his hands up her clothes. The court stated that this was not the case of a boy who needed discipline because he had been dishonest: it was the case of a boy who needed punishment for outrageous conduct. Borstal training was, therefore, not suitable and he would go to prison for twelve months.

In R. *v.* SMITH, the court (Lord Goddard C.J., Cassels and Gorman JJ.: March 4, 1957) set aside a sentence of Borstal training in the following circumstances. S., who was a boy of seventeen years of age, pleaded guilty to stealing a bicycle in October, 1956, and was sent to six months' detention. On January 8, 1957, he was brought before quarter sessions for breach of probation imposed by the sessions in January, 1956, the breach of probation being the offence for which he was sent to a detention centre. The sessions sentenced him to Borstal training. The court stated that where a boy has been sent to a detention centre it was not right to send him to Borstal for an offence committed before he was sent to the detention centre. Accordingly the Borstal sentence would be set aside and S. would be remanded back to the detention centre to finish his time there.

In R. *v.* GARDINER, the court (Cassels, Gorman and Hinchcliffe JJ.: February 18, 1957) affirmed a sentence of Borstal training passed upon G., who was a young man of eighteen years of age, for two offences of gross indecency. G. was otherwise of good character. The court stated that the case was before the court in order that they might consider the suitability of a sentence of Borstal training for offences of a homosexual nature. The court had obtained information from the Prison Commissioners, which corroborated information that they already had, that there was no real objection to a sentence of Borstal training in the case of a young man who had been convicted or pleaded guilty to offences of this kind. The training facilities were there for him, and the Prison Commissioners said that they were suitable for such persons as G.

Preventive detention

In R. *v.* BROWN, the court (Lord Goddard C.J., Hilbery and Streatfeild JJ.) reduced a sentence of eight years' preventive detention to one of two years' imprisonment. B. had pleaded guilty at a Crown Court to an offence of gross indecency with a man of twenty-nine years of age. B. was a man of forty-seven years of age and had three previous convictions for similar offences, one for indecent exposure and seven for minor larcenies. In 1948 he had been sentenced to four months' imprisonment for gross indecency; in 1949 to twelve months' and in 1950 to two years' imprisonment for the same offence. The offence took place in a dark alley. The court stated that this was not a case of an older man corrupting a boy. Having regard to the respective ages of the parties and that the offence did not take place in the full sense in a public place and that there was here no evidence of corruption, the court did not take the view that it was expedient for the protection of the public that preventive detention should be imposed. For those reasons the sentence of preventive detention was inappropriate.

In R. *v*. PATON, the court (Cassels, Gorman and Hinchcliffe JJ.: February 18, 1957) reduced a sentence of fourteen years' preventive detention to one of nine years' preventive detention. P. was convicted before a Crown Court of three offences of housebreaking and larceny and 29 similar offences were taken into consideration. P., who was a man of thirty-eight years of age, had fourteen previous convictions, mostly for similar offences. P. had never previously served a sentence of preventive detention and had never used violence in the commission of any offence. The court stated that there was no question that this was a bad case. However, the sentence passed upon P. was the maximum sentence of preventive detention, and the court considered that the maximum sentence of fourteen years should be reserved for the most serious cases. Where the prisoner had previously served a sentence of preventive detention the maximum sentence might be imposed if the court arrived at the conclusion that it was a shocking case.

In R. *v*. RICKETTS, the court (Lord Goddard C.J., Cassels and Hinchcliffe JJ.: February 11, 1957) affirmed a sentence of seven years' preventive detention. R. had pleaded guilty at a magistrates' court to two offences of larceny in a dwelling-house. R., who was a woman of thirty-one years of age, had ten previous convictions mostly for larceny. The court stated that this case was before them in order to consider whether preventive detention should be given to a prisoner aged no more than thirty-one and, though a persistent offender, one who was a petty thief rather than a dangerous criminal. Preventive detention had been provided to protect the public from persistent offenders on whom punishment appeared to have no effect. R. was a persistent offender and corrective training and imprisonment had been tried and failed. Accordingly, this was one of those cases for which Parliament had provided preventive detention.

Corrective training

In R. *v*. BARRETT, the court (Byrne, Slade and Barry JJ.: May 27, 1957) reduced a sentence of three years' corrective training to one of twelve months' imprisonment. B. had pleaded guilty at quarter sessions to attempted shopbreaking. B., who was a man of twenty-nine years of age, had five previous convictions but had never been sentenced to a term of imprisonment. The court stated that, having regard to the fact that B. had never been to prison before—in many instances the penalty had been a small fine which was perhaps some indication that the offences were not of a very grave nature—and that this was an attempt to commit an offence for which the maximum sentence would have been seven years, three years' corrective training was excessive.

In R. *v*. PHILLIPS, the court (Cassels, Gorman and Hinchcliffe JJ.: February 18, 1957) varied a sentence of eighteen months' imprisonment consecutive to corrective training to one of three years' imprisonment. P., a man of twenty-three years of age, had pleaded guilty at quarter sessions to housebreaking and had asked for three other offences to be taken into consideration. The offences had been committed whilst P. was serving a sentence of corrective training from which he had escaped. The sentence of eighteen months' imprisonment was imposed by quarter sessions to follow the completion of the sentence of corrective training. The court stated that it was unwise to pass a sentence of imprisonment to follow a sentence which had been passed with a view to reformative treatment. The court would, therefore, vary the sentence of eighteen months' to one of three years' imprisonment to date from conviction; the effect of this variation would be that P. would no longer have to serve the sentence of corrective training which would be absorbed in the sentence of imprisonment.

In R. *v*. HEDGECOCK, the court (Lord Goddard C.J., Hilbery and Donovan JJ.: May 6, 1957) varied a sentence of imprisonment imposed consecutive to corrective training to a sentence of imprisonment to date from conviction. The facts were similar to those in R. *v*. PHILLIPS (*supra*). The court stated that, where a man sentenced to corrective training was brought up before the period of corrective training had expired, it was not desirable to send him back to finish the corrective training. The right course was to pass a sentence of imprisonment to date from conviction having effect so as to absolve the sentence of corrective training.

Practice and Procedure

Court of Criminal Appeal

Murder—non-capital murder appeals

On May 13, 1957, the Lord Chief Justice sitting in the Court of Criminal Appeal called attention to the position arising on non-capital murder appeals to the Court of Criminal Appeal. He said that the court could not receive applications for leave to appeal against a life sentence for non-capital murder under the Homicide Act, 1957, because section 3 (*c*) of the Criminal Appeal Act, 1907, provided that a person may appeal against sentence " unless the sentence is one fixed by law " ; the sentence of imprisonment for life was fixed by law by the Homicide Act. Dealing with the position on applications for leave to appeal against conviction, his lordship said that such applications would not, as formerly, be listed as final appeals and the prosecution would not be represented. In all non-capital murder cases the cases would be treated in the ordinary way as applications for leave to appeal and would be listed simply as applications. The prosecution need not be represented unless leave to appeal was given. [H. P.]

Reports Submitted to Courts by the Prison Commissioners

Home Office Circular No. 107/57, dated May 29, 1957

" I am directed by the Secretary of State to say that his attention has been drawn to the fact that reports submitted to courts of quarter sessions by the Prison Commissioners on persons eligible for Borstal training, corrective training or preventive detention are sometimes read out in court in the course of the proceedings.

" While there can be no objection to reference being made in general terms to the recommendation of the Commissioners on the offender's suitability for a particular sentence or to their observations on his physical or mental condition, it appears to the Secretary of State to be undesirable that the full report should be made public. It is the endeavour of the Prison Commissioners to include in such reports as much relevant information about the prisoner's character and background as can be obtained to assist the court in determining the appropriate treatment for the offender. If such information is to be complete it is unavoidable that it should sometimes contain material reflecting adversely on other persons as for example, where members of the family of a lad eligible for Borstal training are engaged in crime, or where a man living with one woman is maintaining a lawful wife elsewhere. In such circumstances the disclosure of the full terms of the report may cause hardship and distress to persons not before the court.

" In accordance with the provisions of sections 20 (8) and 21 (5) of the Criminal Justice Act, 1948, a copy of the report must be given to the offender or his counsel or solicitor, and it is open to the offender to dispute its contents if he wishes to do so. Subject to this requirement, the report is intended for the confidential information of the court and it is desirable that its contents should not receive any wider circulation than is necessary. The Secretary of State would accordingly suggest that the terms of the report should not usually be made public unless it becomes necessary to do so, because the defence wish to challenge any part of it or for other reasons ask for it to be read out. The Lord Chief Justice, who has been consulted, has been good enough to say that he agrees."

Magistrates' Courts

Procedure under the Police (Property) Act, 1897

An application for an order under this Act may be made " either by an officer of police or by a claimant of the property " but, in practice, a police application of this kind is a rarity in the magistrates' courts because, if no one lays claim to the property, the regulations made under the Act will automatically, after a lapse of time, give the police all they would be likely to get from a court order. When the claimant is the person in whose possession the property was when it was taken by the police, no difficulty arises over the procedure appropriate to the application; the claimant takes out a summons against the police to show cause why an order should not be made in his favour under the Act and this brings about a normal relationship of complainant and defendant at the hearing. Cases of this type account for a large proportion of the proceedings brought under the Act, but on occasion there are two claimants to the property and then awkward questions on procedure may be posed for solution by the court.

When there are two or more claimants it is usual for the proceedings to be commenced in the same way as when there is a single claimant who was the original possessor of the property; this means that each claimant takes out a separate summons against the police to show cause why an order should not be made in his favour. At the hearing one of these summonses must necessarily take precedence of the other in the day's list. Does this make it possible for the applicant in that summons to demand that his case be heard and decided before the other application or applications are considered? If the ordinary summary jurisdiction procedure applies to the Police (Property) Act it would seem that such a demand would be legally justified because each summons would have to be regarded as a separate complaint for an order and there could be no joint hearing unless all the parties consented. The fact that the subject-matter of all the summonses was the same would not avail against the fact that the parties in each set of proceedings were different.

It is obvious that to hear separately multiple applications for an order in respect of the same property would not only be very inconvenient but might lead to injustice being done. If the police were neutral in the matter (as would often be the case) there would be no cross-examination of the various applicants, because they would have no status in each other's proceedings. This would give a considerable advantage to the claimant whose case was heard first and would make it impossible for the court to test the various stories told against one another. Indeed, it would probably be wrong to take any account of the evidence given in one summons when reaching a decision on another. The task of the magistrates in trying to reach the truth of the matter in such circumstances would be formidable, to put it at its mildest.

To prevent this position arising it is legitimate to look for legal arguments against the view of the law which would necessarily lead to it. That view proceeds on the assumption that the proceedings are governed by the ordinary law of summary jurisdiction. This involves an identification of the " application " made under the Police (Property) Act with a " complaint " for an order under section 43 of the Magistrates' Courts Act, 1952. There is, however, no general authority for such an identification and there are specific instances where the legislature has shown quite clearly that it does not regard " application " and " complaint " as synonymous. For example, section 51 of the Act of 1952 prescribes that " an application under section 3 of the Bastardy Laws Amendment Act, 1872, for a summons . . . shall be made by complaint " ; and rule 78 of the Magistrates' Courts Rules, 1952, reads " An application . . . for an order removing a disqualification for holding or obtaining a licence shall be by complaint."

Nothing in the relevant Act or in any regulations prescribes the procedure which is to be followed in the case of an application for an order in respect of property in the possession of the police. Accordingly, there is no compelling reason to treat the application as a " complaint " in the technical sense; and courts exercising jurisdiction under the Act of 1897 may well regard the omission of any procedural provisions as an indication that they are free to adopt whatever procedure seems likely to achieve a just result. On this view it would not only be reasonable and convenient, but also in the best interests of justice, to hear multiple applications in respect of the same property at one and the same time, and to allow cross-examination of the witnesses of each claimant by all the other claimants. The final decision of the court could then properly be reached by consideration of all the evidence available.

This conclusion is strengthened by a closer consideration of the practice normally adopted for bringing applications under the Act before the court. Although it is taken for granted that the summons which must be issued has to be directed to the police, the Act does not say so; and it seems arguable that, in common justice, a summons should be served not only on the police but also on the person who originally had the property, if he is not the applicant. This would do much to ensure that the application was not successful merely because the respondent had no interest in its subject-matter, and it would automatically give the real parties in the case the right of mutual cross-examination. [A. E. JONES.]

Summary Justice

Animals

Causing unnecessary suffering to his dog contrary to the Protection of Animals Act, 1911, s. 1; fined £10 with £6 6s. costs, banned from keeping a dog for five years; Pearman: Wakefield City Court (*Wakefield Express*, May 4).

Youth shooting and killing a wild duck contrary to the Protection of Wild Birds Act, 1954, s. 1; fined £5 and air rifle confiscated; Barton: Kenilworth Magistrates' Court (*Birmingham Mail*, May 1).

Exchange control

Attempting evasion of prohibition of exportation of sterling to value of £3,089 contrary to the provisions of the Exchange Control Act, 1947, s. 22; fined £500 with alternative of six months' imprisonment; Shaer: Lewes Magistrates' Court (*Manchester Guardian.* May 21).

Explosives

Two schoolboys placing an explosive substance near public library with intent to damage it, contrary to the provisions of the

Explosive Substances Act, 1883; each sent to a detention centre for three months; Hardy, Wilkins: Wallington (Surrey) Juvenile Court (*Evening Standard*, June 4).

Road traffic

Cycling with baby on crossbar of bicycle contrary to the Road Traffic Act, 1934, s. 20; fined 10s.; Sheath: Warrington Magistrates' Court (*Liverpool Echo,* May 15).

Driving a horse and cart and failing to keep to the left or near-side when meeting a motor-car contrary to the Highway Act, 1835, s. 78; fined £2 with £1 costs; Nicholls: West Riding Magistrates' Court (*Wakefield Express*, May 18).

Driving when under the influence of drink contrary to the Road Traffic Act, 1930, s. 15; man pushing and steering a car could be said to be driving: fined £10 with £3 3s. costs, disqualified from obtaining a licence for one year; Mason: Wallasey Magistrates' Court (*Liverpool Echo*, May 15).

Sale and trade

Selling short weight coal and carrying coal on a vehicle of less weight than represented; fined £5 on first count and £3 on each of seven summonses for second count; Thomas Lebon & Sons: Wimbledon Magistrates' Court (*Evening Standard,* June 5).

Vagrancy

Husband, wife and three children living in a car for three weeks, contrary to the provisions of the Vagrancy Act, 1824, s. 4, husband driving while disqualified and driving while uninsured contrary to the provisions of the Road Traffic Act, 1930, ss. 7 (4) and 35 respectively: Husband sentenced to seven days' imprisonment (nominal) on vagrancy charge and six months' and one month's imprisonment (to run concurrently) on driving offences; disqualified from driving for three years; wife placed on probation for eighteen months; Osmond: West London Magistrates' Court (*Manchester Guardian*, May 16).

Case and Comment *

Breaking Out of Prison—*Whether an offence known to law*

R. *v*. HINDS [1] (Court of Criminal Appeal: Burne, Slade and Glyn-Jones JJ.: May 20, 1957) (*The Times*, May 21, 1957).

H. was convicted at assizes of breaking out of prison and sentenced to eleven days' imprisonment. The escape took place while H. was serving a sentence of twelve years' preventive detention. He appealed against his conviction to the Court of Criminal Appeal on the main ground that there was no offence known to the law of escaping from prison, without proof of any actual breaking out, in the case of a convicted person. H. contended that an escape from prison, in the case of a person awaiting trial was a contempt of court, but that there was no recorded case of a convicted person being indicted for leaving prison.

Held, dismissing the appeal, that H.'s view of the law was completely erroneous and it was a common law offence to escape from prison in the case of both convicted persons and those awaiting trial. [H. P.]

COMMENTARY. According to Archbold, 1263, and Russell, 353, an actual breaking is required to constitute the felony of Prison Breaking, and merely getting over the walls or passing out through a door will not suffice. Authority for this proposition can be found in *R.* v. *Burridge* (1735) 3 P.Wms. 439, 484, *per* Lord Hardwicke C.J. delivering the judgment of the Court of King's Bench.

It is, however, an indictable misdemeanour for a prisoner on a criminal charge to escape from lawful confinement without any breaking, as, *e.g.*, where the doors are left open by the consent or negligence of the gaoler, or where he escapes through a breach made by others without his connivance or consent: Russell, 339. An interesting precedent (to which our attention has been drawn by Master King) may be found in the 2nd volume of Gude's *Crown Office Practice* (1828), at p. 403. Sir Thomas Cochrane, Knt., commonly called Lord Cochrane, escaped from the King's Bench Prison where he was serving a sentence of 12 months and a fine of £1,000 for conspiring with Berenger and others to raise the public funds by publishing false news of Bonaparte's defeat. It was never discovered how he escaped, but he was arrested a fortnight later and was indicted at the Summer Assizes for Surrey in 1815 for the escape. The indictment was removed on certiorari and in Michaelmas Term, 1816, he was fined £100 for the escape. The fine was paid by individuals subscribing one penny each and it was paid in copper coin in the Crown Office, where Gude was then the clerk who had to count them.

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* Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab.), Barrister-at-Law.

[1] The appellant appeared in person. For the Crown: *Claud Duveen Q.C.*, *E. G. Beresford* (instructed by Director of Public Prosecutions).

Cochrane was supposed to have escaped over the prison wall which was forty feet high and topped with a *chevaux de frise*. *Ibid.*, pp. 404 and 405.

While it seems that Hinds was not guilty of Prison Breaking properly so-called, there can then be no doubt that he was guilty of an offence indictable at common law.

Contempt—*Lack of knowledge—lack of intention—innocent dissemination*

R. *v.* GRIFFITHS, *ex p.* ATTORNEY-GENERAL [2] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: May 10, 1957).

On April 4, 1957, there was on sale on bookstalls in London an issue dated April 1 of the European edition of the magazine *Newsweek* which contained two paragraphs relating to the trial then proceeding at the Central Criminal Court of Dr. John Bodkin Adams for alleged murder. The paragraphs contained matter highly prejudicial to Dr. Adams. The magazine was owned by a company registered in America and the European edition was made up in New York. It was distributed in this country by R. Co. without the intervention of the magazine's London office. G. was the chief European correspondent in this country. He took no part in the preparation of the magazine, his duties being merely those of a reporter. He had not written the offending paragraphs or sent in the material on which it was based. On a motion by the Attorney-General for writs of attachment for contempt against G., R. Co. and S. Co., who had sold the magazine on their bookstalls, the two companies claimed that they did not know that the publication contained the offending paragraphs and had no reason to suppose that it would.

Held, that, the offence being, not the mere preparation of the article, but the publication of it during the proceedings, G., in the circumstances, was not guilty of contempt; that as regards the two companies, lack of knowledge of the contents of the offending article was no defence, nor was lack of intention: see *R.* v. *Odhams Press, ex p. Attorney-General* ([1956] Crim.L.R. 831); to those who in the way of their trade were responsible for putting the offending matter into circulation the defence of innocent dissemination was not available in cases of contempt, and although it was regrettable that in holding the companies guilty of contempt the court could not also deal with those who were far more responsible but were out of the jurisdiction, the court would impose a fine on each company of £50. [J. D. P.]

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[2] For the applicant: *Sir Reginald Manningham Buller Q.C., A.-G., Rodger Winn* (instructed by Director of Public Prosecutions). For G.: *Neville Faulks* (instructed by Crane & Hawkins). For R. Co.: *W. P. Grieve* (instructed by Lawrence Jones & Co.). For S. Co.: *Gerald Gardiner Q.C., Helenus Milmo* (instructed by Bircham & Co.).

COMMENTARY. It was argued that, if the respondents were liable, so would be every small newsagent or street seller who sold the paper. While admitting that this might logically be so, the court indicated that it would not regard such applications with favour. *A fortiori* a suggestion that a reader, who lent the paper to a friend, was guilty of contempt would apparently be regarded as "extravagant." *Cf. McLeod* v. *St. Aubyn* [1899] A.C. 549.

The decision appears to have had serious results. Distributors have sought from the proprietors of foreign publications, through the importers, their views about three protective measures: (1) the printing of the name of an executive who would accept responsibility for the contents of the paper before a British court; (2) an indemnity against costs arising out of future actions; and (3) that importers should scrutinise all publications before supplying them to the distributors (*The Times*, May 22, 1957). It has been pointed out that even if a publisher appoints a man supposedly responsible, the courts might hold that he was not. There would be, moreover, considerable doubt about the enforceability of such an indemnity, at least if the distributors knew, or were negligent in not knowing, the circumstances rendering the publication illegal. "It is . . . a principle of our law that the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment" (*Askey* v. *Golden Wine Co.* [1948] 2 All E.R. 35, 38, *per* Denning L.J.). There appear to be very formidable practical difficulties in the way of scrutinising foreign publications, and it would be likely to result in delayed or restricted availability. The proposals seem to have made little progress, and the supply of foreign publications continues to be hampered (*The Times*, May 31, 1957).

There seems to be a strong case for a re-examination of the law of contempt of court, especially as regards the defence of innocent dissemination.

Customs and Excise — *Precious metals — gold and silver-plated articles*

PEARCE *v.* NEALE [3] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: May 8, 1957) (*The Times*, May 9, 1957).

An importer, who had a licence to import imitation jewellery, "not including articles containing precious metals," imported a consignment of religious articles consisting of medals, bracelets and chains which were either gold or silver plated on base metal. The gold and silver plating contained small, but not minimal, quantities of gold and silver, both of which metals were precious metals. On an information by a customs officer under the Import, Export and Customs Powers (Defence) Act, 1939, claiming that the goods were liable to forfeiture being articles containing precious metals within the meaning of the prohibition in the Open General Import Licence dated June 3, 1955, the justices dismissed the information. On appeal by the customs officer:—

Held, allowing the appeal, that the articles in question clearly contained precious metal and their import was therefore prohibited by the Import Licence. [J. D. P.]

Dangerous Driving—*Momentary inattention*

R. *v.* PARKER [4] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Donovan JJ.: May 6, 1957) (*The Times*, May 7, 1957).

P. was convicted at assizes of causing death by dangerous driving and was fined £50. The evidence at the trial was that P. drove across traffic lights when they were showing red in his direction and came into collision with a motor bus. The rear end of P's car was flung round and struck an old man, who was killed. P. appealed to the Court of Criminal Appeal against his conviction on the ground that the judge was wrong in directing the jury that momentary inattention could amount to dangerous driving.

Held, dismissing the appeal, that dangerous driving was a question of degree. Were there circumstances on which the jury could find that P. was driving dangerously? P. had said that momentary carelessness ought not to amount to dangerous driving, but this court was not going to lay down what constituted dangerous driving; that was a question of fact for the jury. [H. P.]

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[3] For the customs officer: *Rodger Winn* (instructed by Solicitor for Commissioners of Customs and Excise). For the importer: *F. Blennerhassett* (instructed by William Hoskiss).

[4] For the appellant: *W. G. Morris* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *K. Burke* (instructed by the Director of Public Prosecutions).

COMMENTARY. Though Sellers J. is said to have stated in an unreported case (see [1955] Crim.L.R. 239) that a deliberate act as opposed to mere inadvertence is required for dangerous driving, the better opinion seems to be that the test is purely objective and that a man may drive dangerously though he himself foresees no danger whatever. *Cf. Kay* v. *Butterworth* (1945) 173 L.T. 191 and *R.* v. *Scates* [1957] Crim.L.R. 406. It is apparent that a higher degree of negligence should be proved to establish dangerous driving under section 11 (1) than is required to convict of driving without due care and attention under section 12 (1). It would, however, probably not be practicable for a court to attempt to define, as a matter of law, where the boundary between the two offences lies.

Fine—*Recoverable of administrators as debt due to the Crown*

H.M. TREASURY *v.* HARRIS[5] (Q.B. Division: Lord Goddard C.J.: May 20, 1957).

On May 17, 1952, H. was convicted at quarter sessions on an indictment containing four counts of receiving and he was ordered to be imprisoned for two years concurrently on each of the four counts and fined £250 on each count with a further four months' imprisonment in default. On January 7, 1953, H. died, and no part of the fines having been paid, the Treasury sued his administrators for £1,000.

Held, that the fact that H. was dead, so that he could no longer go to prison if he did not pay the fine, did not do away with the fine. It was a debt due to the Crown and was still due to the Crown. There was nothing in sections 14 and 15 of the Criminal Justice Act, 1948, which said that a man might prevent the Crown from recovering by electing to go to prison, although if he did go to prison the imprisonment wiped out the fine, accordingly, the Treasury were entitled to recover the amount of the fine from the administrators. [J. D. P.]

COMMENTARY. Lord Goddard said that the court had power not only to punish but to take steps so that the accused should not benefit by keeping the proceeds of the crime; and it was important that his estate should not benefit by the crime (*The Times*, May 21, 1957). In the present case, where the accused had been convicted on a receiving charge, it may be that the recovery of the fine would simply mean the recovery from the deceased's estate of the proceeds of crime; but there does not seem to be anything to limit the decision to cases where the accused's estate may have benefited by the crime. It apparently applies to all fines imposed by criminal courts. In cases where the crime in question has resulted in no benefit to the accused's estate, to allow the Crown to recover after his death would be simply to punish the beneficiaries under his will or on his intestacy. There are, after all, other remedies for the recovery of the ill-gotten gains. See "Restitution in Criminal Proceedings" [1957] Crim.L.R. 305, 377. While the legal reasons for the decision seem, with respect, to be impeccable, it may be doubted whether it is wise as a matter of policy. As it was a case of first impression, it was in fact open to the Lord Chief Justice to decide it either way. The primary purpose of criminal sanctions is punishment and a man cannot be punished after he is dead; why punish those entitled to his estate?

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[5] For the Crown: *Rodger Winn* (instructed by Treasury Solicitor). For the administrators: *E. S. Fay Q.C., T. R. Crawford* (instructed by Speechly, Mumford & Craig for Lamport, Bassitt & Hiscock, Southampton).

Larceny as Bailee—*Hire-purchase agreement—disposal of property by hirer*

R. *v.* FOSTER[6] (Lincolnshire (Parts of Lindsey) Quarter Sessions: Walker Carter, Q.C., Chairman: May 4, 1957).

The defendant was charged with larceny as a bailee of a motor-cycle in two counts of an indictment. The first charged an offence between October 31 and December 1, 1956, and the second an offence on December 20, 1956, in relation to the same vehicle. The defendant was the hirer of the motor-cycle in question under a hire-purchase agreement and, having paid part only of the instalments due, was not in a position to exercise the option to purchase provided in the agreement as being exercisable when all the instalments had been paid on a further payment of 10s. With regard to the first count, the undisputed evidence was that the defendant had handed over the motor-cycle to one K. and that K. had paid him £1, and that after a few days K. had returned the motor-cycle to the defendant, but did not ask for his money back. K.'s evidence was that there had been an out-and-out sale of the motor-cycle to him for £50 payable by 50 weekly payments each of £1 and that the motor-cycle was to become his on the first payment. The defendant's case was that the arrangement had been that K. should take the motor-cycle for a trial period before coming to any definite arrangement and that the £1 had been paid by him merely as security. With regard to the second count, the evidence was that on the day named the defendant had handed over the motor-cycle to one T. T. said in evidence that the agreement was that he should pay to the defendant three weekly sums each of £3 as a "kind of deposit" and that he should then enter into "some kind of hire-purchase agreement" with the defendant; that, after paying the three sums of £3, he was visited by the police; and that therefore he handed back the motor-cycle to the defendant, who returned him the £9.

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[6] For the prosecution: *T. R. Fitzwalter Butler* (instructed by T. J. Lewis, Scunthorpe). For the defendant: *H. A. Skinner* (instructed by William Bains, Brigg).

By the proviso to s. .1 (1) of the Larceny Act, 1916: "A person may be guilty of stealing [anything capable of being stolen] notwithstanding that he has the lawful possession thereof, if being a bailee . . . thereof, he fraudulently converts the same to his own use or the use of any person other than the owner."

At the close of the case for the prosecution a submission of no case to answer was made on behalf of the defence.

The Chairman ruled that the submission must succeed on the second count, as there was no evidence of conversion by the defendant sufficient to satisfy the requirements of the proviso to s. 1 (1), but that there was evidence to go to the jury on the first count.

The jury returned a verdict of Not Guilty on the first count, and (by direction of the Chairman) a verdict of Not Guilty on the second count.

[T. R. Fitzwalter Butler, *Barrister-at-Law*.]

COMMENTARY. A hirer of goods under a hire-purchase agreement is a mere bailee, the ownership remaining in the latter. If, therefore, the hirer does acts in relation to the goods which are inconsistent with the bailment and have the effect of depriving (or purporting to deprive) the latter of his interest, then the hirer may be guilty of larceny. Thus the destruction or sale of the property bailed would be a sufficient conversion. Where, on the other hand, the bailee merely pawns the goods the position is not so clear. Pawning without any intention to redeem is clearly larceny; pawning with the intention to redeem, but without any reasonable prospect of being able to do so, would seem to suffice also: *R.* v. *Medland* (1851) 5 Cox 292. Pawning with the intention and ability to redeem would presumably not be larceny.

K.'s evidence on the first count that there had been an out-and-out sale would seem therefore to be evidence of a sufficient conversion; but there seems to have been no evidence of such a sale (or even hire-purchase transaction) on the second count.

If the defendant had intended to pay all the moneys due to the letter out of the £50 which he expected to receive from K. it is probable that the act would not amount to larceny—even though it might constitute the *actus reus* of that crime and be done without a claim of right—because it would not be done "fraudulently." On the meaning of this term in the Act, see [1956] Crim.L.R. 78 and 238.

Murder—*Fitness to plead—preliminary issue*

R. *v.* BEYNON [7] (Glamorgan Assizes: Byrne J.: April 3, 1957) ([1957] 2 W.L.R. 956).

B. was charged on an indictment for murder. On his arraignment and before he pleaded, counsel for the Crown applied that the issue of fitness to plead should be tried as a preliminary issue. Counsel for B. objected to the empanelling of a jury to try that issue submitting that unless the law compelled the court to deal with the issue of insanity, natural justice required that the general issue should be tried first.

Held, not following *R.* v. *Roberts* [1954] Crim.L.R. 20, that the law had always been that an insane person could not be tried and if the court was aware of the fact that there was a preliminary issue whether the person charged was insane so that he was unfit to be tried, it was the duty of the court to see that that issue was tried before the general issue even though no application was made by the prosecution or defence. [J. D. P.]

COMMENTARY. In *R.* v. *Roberts,* Devlin J. held that the defence could not be compelled to choose between fighting the general issue or dealing with the issue of unfitness to plead. Where the defence wished to challenge the prosecution's case on the general issue, the question whether the accused was fit to plead could be tried and determined by the jury together with the general issue, so that the right which would flow to the defence if the accused were found unfit to plead would be preserved. See [1954] 2 Q.B. 329.

A precedent was found in *R.* v. *Berry* (1876) 1 Q.B.D. 447, where both questions were put together by a chairman of quarter sessions, and the Court of Crown Cases Reserved apparently found nothing wrong with this procedure. Devlin J. said: "There must, in my view, be a procedure which would enable counsel for the defence to have advantage of taking both points, and if there were no such procedure I think that it would be necessary to invent it, because to insist on the issue of fitness to plead being tried might result in the grave injustice of detaining as a criminal lunatic a man who was quite innocent; indeed, it might result in the public mischief that a person so detained would be assumed, in the eyes of the police and of the authorities, to have been the person responsible for the crime—whether he was or was not—and investigations which might have led to the apprehension of the true criminal would not take place." In *Roberts* the jury were sworn merely to try the general issue, the prosecution offered no evidence and, on the judge's direction, the jury found the prisoner Not Guilty. See "Trial of a Deaf Mute" [1954] Crim.L.R. 20.

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[7] For the Crown: *F. Elwyn Jones Q.C., Alun Davies* (instructed by Director of Public Prosecutions). For the accused: *Norman Richards Q.C., Bruce Isaas* (instructed by Andrew, Thompson & Partners, Swansea).

Of course all persons who are found insane on arraignment are committed to Broadmoor although they have not been convicted of any crime. According to the Royal Commission on Capital Punishment (Report, para. 223) persons who have been found insane on arraignment sometimes—" as is not unnatural "—exhibit a strong sense of grievance on this ground. If the accused has a defence on the general issue—and, as Devlin J. pointed out, he might have a witness who could prove that he was ten miles away at the time of the alleged crime—a strong sense of grievance would indeed not be unnatural. It is respectfully submitted, therefore, that there is much to be said for the procedure adopted by Devlin J.

The Royal Commission expressed the opinion that " it is in principle desirable that a person charged with a criminal offence should, whenever possible, be tried, so that the question whether he committed the crime may be determined by a jury." If the prisoner is incapable of following the proceedings, it is obvious that a trial cannot be allowed to result in a conviction in any circumstances; it is not so clear that the accused should be deprived of his chance of an acquittal.

Offences against the Person—*Administering noxious thing so as to endanger life—malice*

R. *v.* CUNNINGHAM [8] (Court of Criminal Appeal: Byrne, Slade and Barry JJ.: May 20, 27, 1957) (*The Times*, May 21, 28, 1957).

C. was charged at assizes upon two indictments. (For facts see [1957] Crim.L.R. 326.) C. appealed to the Court of Criminal Appeal against his conviction on the first indictment on the main ground that the jury were misdirected on the meaning of the word " maliciously." The judge had directed the jury: " malicious means wicked, something which he has no business to do and perfectly well knows it."

Held, allowing the appeal, that in the opinion of the court, the word " maliciously " in a statutory crime postulated foresight of the consequences. The Court thought that it was incorrect to say that the word " malicious " in a statutory offence meant wicked. The judge in effect had told the jury that if they were satisfied that C. had acted wickedly—and he clearly acted wickedly in stealing the gas meter and its contents—they ought to find that he had acted maliciously in causing the gas to be taken by Mrs. W. so as to endanger her life. In the view of the court it should have been left to the jury to decide whether, even if C. did not intend the injury to Mrs. W., he foresaw that the removal of the gas meter might cause injury to someone, but nevertheless removed it. The court was unable to say that a reasonable jury, properly directed as to the meaning of the word "maliciously" in the context of section 23 of the Offences against the Person Act, 1861, would without doubt have convicted, and in those circumstances the appeal would be allowed. [H. P.]

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[8] For the appellant: *S. E. Brodie* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. S. Snowden* (instructed by the Town Clerk, Bradford).

COMMENTARY. The judgment affirms the view that "malice" requires either intention or recklessness with respect to those elements in the *actus reus* to which it is held to apply and, therefore, that an intention to steal would not be malice for this crime.

The court approved the statement in Kenny, *Outlines of Criminal* Law (16th ed. by J. W. C. Turner), 186: "In any statutory definition of a crime 'malice' must be taken not in the old vague sense of 'wickedness' in general, but as requiring either (1) an actual intention to do the particular *kind* of harm that in fact was done, or (2) recklessness as to whether such harm should occur or not (*i.e.*, the accused has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it). It is neither limited to, nor does it indeed require, any ill-will towards the person injured."

Though the matter is not made absolutely clear, it does not seem that the court took the view that foresight of actual danger to life or the infliction of *grievous* bodily harm is necessary, and it seems that the statute would be satisfied by foresight that a noxious thing would be administered—*i.e.*, that harm of "the particular kind," though not necessarily of the particular degree, would be caused. Thus the court said that it was enough if the appellant foresaw "that the removal of the gas meter might cause injury to someone." Such an interpretation would be in accordance with earlier authority. See the commentary at [1957] Crim.L.R. 326.

There was, in this case, evidence on which a jury properly directed, might have found that the accused had such foresight, *i.e.*, there was a case to go to the jury, but not so overwhelming a case that the only reasonable verdict would be Guilty.

For a detailed examination of the use of the terms "malice" and "maliciously" see Edwards, "*Mens Rea in Statutory Offences*." Chapter 1.

Receiving—*Evidence as to previous convictions—discretion of the court*

R. *v*. C. TURNER, F.. H. TURNER and C. H. TURNER [9] (Sheffield Quarter Sessions: G. F. Leslie, Assistant Recorder: April 10, 1957).

All three accused were concerned in managing a scrap metal business and were charged with receiving stolen scrap metal contrary to section 33 (1) of the Larceny Act, 1916.

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[9] For the prosecution: *P. Stanley Price Q.C., J. F. S. Cobb* (instructed by the Town Clerk, Sheffield). For the defence: *A. G. Sharp, M. Gosney* (instructed by Harold Jackson & Co.).

The indictment contained ten counts: C. Turner was charged on eight counts with receiving metal scale, and on one count with receiving scrap brass; F. H. Turner was charged on five counts with receiving metal scale and on one count with receiving high-speed steel; and C. H. Turner was charged on one count with receiving high-speed steel.

The prosecution sought to introduce evidence of previous convictions for conspiracy and receiving in the case of each of the accused.

The prosecution argued that once the requirements of section 43 (1) (*b*) of the Larceny Act, 1916, had been complied with, such evidence could be introduced as of right.

The defence contended that the matter was one for the discretion of the court. It was submitted that this contention was supported by the case of *R.* v. *Davies,* 37 Cr.App.R. 16, where it was held that even when the requirements of the section had been complied with, evidence of previous convictions could not be given if, included in the indictment, there was a count for any offence other than receiving. This case was clearly inconsistent with the contention of the prosecution that evidence of a previous conviction could be introduced as of right.

Moreover, in the case of C. H. Turner, there was an additional objection to such evidence. He was only charged on one count, the facts of which were unrelated to those concerning the other counts. If the convictions of his co-accused were admitted, but on the facts his own conviction was not of probative value on the count against him, then it would be especially prejudicial.

It was further submitted that the very words used by the section —" may be given in evidence "—gave the court a discretion in this matter.

Counsel for the defence mentioned a case heard at Kingston-upon-Hull Quarter Sessions in which the then Recorder of Kingston-upon-Hull, Mr. G. H. B. Streatfeild, K.C. (now Streatfeild J.) held that the court had a discretion whether to allow evidence of a previous conviction, and refused to admit it in that case.

Held, that the court had a discretion whether to allow evidence of a previous conviction, admissible under section 43 (1) (*b*) of the Larceny Act, 1916, to be given. The Assistant-Recorder applied *R.* v. *Jenkins,* 31 Cr.App.R. 1, in which it was pointed out by the Court of Criminal Appeal that even where there had been an imputation on the character of the prosecutrix, within section 1 (*f*) of the Criminal Evidence Act, 1898 the judge still has a discretion whether to allow cross-examination of the prisoner as to his own character.

Held, further, that though the court had a discretion to exclude evidence of the previous convictions the evidence should be admitted in this particular case as on the facts it was of probative value, and that any possible prejudice could be dealt with in the summing-up.

In the summing-up the Assistant Recorder directed the jury that the law permitted the evidence of the previous convictions to be given only for the purpose of proving guilty knowledge, and that they must not allow themselves to be prejudiced against the accused in consequence of its admission. It certainly did not follow that because the accused had been guilty of receiving some years ago they were therefore guilty of the present offences. The accused were acquitted on all counts.

[P. M. Baker, *Barrister-at-Law*.]

COMMENTARY. It is " the duty of the judge when trying a charge of crime to set the essentials of justice above the technical rule if the strict application of the latter would operate unfairly against the accused ": *Harris* v. *D. P. P.* [1952] A.C. 694, 707, *per* Viscount Simon. The judge has an overriding duty to ensure that the accused has a fair trial, and thus he has a discretion to exclude evidence which is admissible in law but so prejudicial as to impair the possibility of a fair trial.

In *R.* v. *Davies* the Court of Criminal Appeal does not seem to have treated the case as one of the judge's discretion but rather to have held that, where a count for receiving is tried together with a count charging some other offence, evidence which might otherwise be given under section 43 (1) (*b*) on the receiving count, is inadmissible *in law*. The ruling in the present case is that, where there is no count charging some other offence, the judge has a discretion to exclude evidence under section 43 (1) (*b*). This ruling seems to be *obiter* as the Assistant Recorder decided not to exercise the discretion which he held he had, but it is supported by the general principle stated in *Harris* (above) and the dictum in *Jenkins*. See also *Noor Mohammed* v. *R.* [1949] A.C. 182, 191.

Receiving—*Taking into possession*

HOBSON *v.* IMPETT [10] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: May 8, 1957).

The defendant appealed to quarter sessions against his conviction by justices on a charge of receiving a quantity of white metal ingots knowing the same to be stolen, contrary to section 33 of the Larceny Act, 1916. Quarter sessions found that the day after the ingots had been stolen the defendant helped P., with whom he lodged, to unload from a cart a sack containing some of the ingots and to take them into P.'s house and at the conclusion of the unloading knew that the sack contained stolen ingots and that P. knew this; that on the next day the defendant helped P. and another man to load fifteen of the ingots into a motor-car by picking up some of the ingots and carrying them from the house to the car, knowing that they were stolen and were being taken in the car to be offered for sale; and that the defendant travelled in the car as a passenger, but that it was not proved that he touched the ingots again or took any part in offering them for sale. Quarter sessions were of opinion that by taking up and carrying the ingots to the motor-car the defendant was in manual possession of them and received them within the meaning of section 33, and they dismissed the appeal. The defendant appealed and in the case stated by quarter sessions the question for the opinion of the court was whether, on the facts stated (summarised above) the defendant received any of the ingots and whether the court had directed itself correctly on the law.

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[10] For the defendant: *D. C. Humphreys* (instructed by Hewitt & Co., Dartford). For the prosecution: *B. R. Clapham* (instructed by Sharpe, Pritchard & Co. for N. K. Cooper, Maidstone).

Held, allowing the appeal, that the mere handling of goods did not necessarily amount to receiving, for there might be a picking up without a taking into possession and that the direction which quarter sessions had apparently given themselves was far too wide and wrong in law. There were facts on which it could have been found that the defendant had received the ingots, but quarter sessions as judges of fact were in the same position as a jury and had a jury been given such a direction the conviction would have to be quashed and the court, therefore, had no alternative but to quash the conviction.

[Miss J. F. Lamb, *Barrister-at-Law.*]

COMMENTARY. One who has physical custody of chattels does not necessarily have possession of them in law. A prospective customer handling goods in a shop, a servant holding goods received from his master in the course and for the purpose of his employment, the boy who carries another's bag while the owner walks beside him, have, none of them, possession, but simply custody. So it would seem likely that, in this case, the defendant was never in possession but merely had custody of the ingots while he was actually carrying them.

It is clear that some form of possession or control is necessary to constitute the crime of receiving stolen goods. So one who merely assists in negotiations for the sale of property which he knows to be stolen, but never has control of it cannot be convicted of receiving: *R.* v. *Watson* [1916] 2 K.B. 385. It is not clear that possession in the strict sense is necessary and that custody in some circumstances may not suffice. Thus it has been said that " it is sufficient if the alleged receiver has had control over the stolen goods ": *R.* v. *Gleed* (1916) 12 Cr.App.R. 32. If a servant were to receive from his master goods which he knew to be stolen, to dispose of them on his master's behalf, he would only have custody of them, but there would seem to be an unfortunate gap in the law if he could not be convicted. The facts in *Gleed* were not dissimilar from those in the present case. The appellant was proved to have assisted the thief in lowering a stolen barrel of gin from a van to the ground. The court held that " the mere fact of their having handled the cask together when lifting it from the van is some evidence of such joint possession." If there was evidence of joint possession in that case, it is difficult to see that there was not in this. Perhaps the distinction is that in the earlier case the defence admitted that, " in these circumstances the appellant had joint possession of the barrel sufficient to make him guilty of receiving." The point taken on appeal in *Gleed* was that the Deputy-Chairman in his summing up did not deal with the case as one of joint possession but invited the jury to find that the appellant had " control " over the barrel. The court held that the case had been summed up very properly. This would seem to mean that " control," even if it does not amount to possession, is enough. The jury in *Gleed* must be assumed to have found that Gleed had control of the barrel; in the present case the reported facts seem to show no more than that the accused was acting as a manual labourer working under the instructions of P. In such a case, he could hardly be said to have control.

A further point which might have been taken by the appellant is that the guilty knowledge must exist at the time of receipt. An innocent receipt followed by a guilty retention of stolen goods is not a crime within section 33 of the Larceny Act: *Matthews* (1949) 34 Cr.App.R. 55. It does not appear that the accused had guilty knowledge before the *conclusion* of the unloading.

Road Traffic—*Obstruction by motor-vehicle or trailer—unreasonable user*

THE POLICE *v.* O'CONNOR [11] (Middlesex Quarter Sessions: Harold Williams, Esq., Q.C., Chairman: May 14, 1957).

The defendant was convicted before the justices of the Gore Division of Middlesex of an offence against Regulation 89 of the Motor Vehicles (Construction and Use) Regulations, 1955. (No person in charge of a motor-vehicle or trailer shall cause or permit the motor-vehicle or trailer to stand on a road so as to cause any unnecessary obstruction thereof.)

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[11] For the prosecution: *Sebag Shaw* (instructed by the Commissioner of Police for the Metropolis). For the defence: *David Wild* (instructed by Mauser, Phillips & Co.).

The evidence was that an articulated vehicle measuring 30 feet in length and 7 feet in width and owned by the defendant was standing in the roadway outside the defendant's house, of which he was the freehold owner, from 7.30 p.m. until 9 p.m. The frontage of the defendant's house was some 84 feet and the vehicle was standing wholly outside the house. The vehicle was properly parked close to the kerb, facing the right direction, and properly lighted. The roadway was a cul-de-sac.

On appeal the case of *Solomon* v. *Durbridge* (1956) 120 J.P. 231, was referred to by the prosecution. It was submitted by the defence that, *inter alia*, upon the construction of the Regulation, it was necessary to show an unreasonable user of the highway before an obstruction was proved and that the mere presence of a motor-vehicle at rest on the highway is no evidence of unreasonable user and therefore no obstruction. It was submitted that the users of the highway are not restricted to passing and repassing but have also the right to stop for a reasonable time.

Held, allowing the appeal, that there was no evidence before the court that the defendant had made any unreasonable use of the road.

[David Wild, *Barrister-at-Law.*]

COMMENTARY. Whether there has been an unnecessary obstruction is a question of fact. The time for which the vehicle is parked is evidently one of the most important factors to be taken into account in deciding this question. In *Solomon* v. *Durbridge* the area obstructed was much smaller—it was an ordinary car—but the time for which the obstruction persisted—five and a quarter hours—was much longer. In that case the Lord Chief Justice said that if a car stopped for a few minutes, no offence would be committed. Another important factor is undoubtedly the place in which the obstruction occurs: in *Solomon* v. *Durbridge* it was not a cul-de-sac, but the Victoria Embankment.

On the whole question, see "Parking and the Law" [1957] Crim. L.R. 6.

Road Traffic—*Road—quayside*

NEWCASTLE-UPON-TYNE CORPORATION *v.* WALTON [12] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: May 7, 1957).

The corporation were convicted (1) of employing X, who did not have a driving licence to drive a mobile crane along a quayside, contrary to section 4 (1) of the Road Traffic Act, 1930; (2) with using through X and Y a mobile crane for purposes other than engineering operations contrary to art. 15 (*b*) of the Motor Vehicles (Authorisation of Special Types) General Order, 1955 ; (3) for using through X and Y a mobile crane contrary to Part 3 of the Motor Vehicles (Construction and Use) Regulations, 1955, for a purpose so unsuitable as to be likely to cause danger to a person on the vehicle or on the road. On appeal, the recorder found that the quayside in question was the land of the corporation, that they employed X and Y as crane drivers, the former not having a driving licence, that the cranes were not engaged in engineering operations, and that members of the public were free to walk or motor along the quayside and did so and there was no physical hindrance or obstruction preventing them and no notice or other indication that they were not there as of right. The recorder, allowing the appeals, held that certain private Acts of Parliament left the whole of the operation of this quayside to the corporation ; that the public had in law no right to use the quayside ; and that it was not a road for the purpose of the Act of 1930 and the regulations.

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[12] For the prosecutor: *Lyall Wilkes* (instructed by Robinson & Bradley). For the corporation: *N. Harper* (instructed by the Town Clerk).

Held, allowing the prosecutor's appeal, that having regard to the definition of a road in the Road Traffic Act, 1930, the quayside was a road, to which the Act and all the regulations made thereunder applied. [Miss C. J. Ellis, *Barrister-at-Law*.]

COMMENTARY. "Road," as defined by the Road Traffic Act, 1930, "means any highway and any other road to which the public has access, and includes bridges over which a road passes." Whether a place is a road or not is primarily a question of fact: *Heath* v. *Pearson* [1957] Crim.L.R. 195; but this, like all questions of fact, involves a preliminary question of law, *i.e.*, is there evidence on which the question can be so found?

The fact that the public had no legal right to use the quayside does not seem to exclude it from the statutory definition which seems to require simply that they should have access in fact. Thus it has been held, under the Road Transport Lighting Act, 1927—which includes a similar definition of "road"—that a forecourt of a hotel, over which the public were in the habit of walking and driving, was a road: *Bugge* v. *Taylor* [1941] 1 K.B. 198. The argument that a "road" must be a way over which the public have some rights was advanced in that case and rejected.

Sentence—*in absentia*

R. *v.* DONELAN AND REEVES[13] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Devlin JJ.: May 13, 1957).

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[13] For the appellant Donelan: *F. S. Bresler* (instructed by Lincoln & Lincoln). For the appellant Reeves: *H. M. Self* (instructed by Lincoln & Lincoln). For the Crown: *J. S. Streeter* (instructed by the Solicitor, Metropolitan Police).

D. and R. were convicted at quarter sessions of taking and driving away a car without the owner's consent. D. was sentenced to 12 months' imprisonment and R. was remanded pending appeal to the Court of Criminal Appeal. The facts were that one P., desiring to sell his motor-car, was negotiating its sale to R. P. did not want the car to go on the road because it was not licensed or insured, but R. and D. nevertheless started the car and drove it on the road. On appeal:—

Held, that this was not the class of case which deserved imprisonment and D. and R. ought to have been charged with taking a car on a road when it was not licensed or insured. However, the court would find great difficulty in actually quashing the conviction. The court would give D. a conditional discharge. R. was under recognisance to appear at the sessions, and the court would tell the sessions that R. had been sent back to his regiment so that the sessions could enter an absolute discharge. This offence was a misdemeanour for which the sentence could technically be passed *in absentia* and, in view of that, it was unlikely that the sessions would order him to attend. [H. P.]

Acts and Orders *

Animals

LIVE POULTRY (RESTRICTIONS) ORDER, 1957 (S.I. No. 787): operative May 20, 1957. The Order of 1954 (S.I. No. 121) as amended (S.I. 1954, No. 1745, S.I. 1956, No. 1439) is revoked and re-enacted with some alterations. The principal changes are (1) the prohibition of the movement of poultry from any part of Great Britain into an area comprising Wales, the Scilly Isles and certain Northern, West Midland and South Western counties of England is withdrawn; but this withdrawal does not affect the prohibition of the movement of poultry, day-old chicks or hatching eggs into Scotland from any other part of Great Britain; (2) poultry exhibitions and shows held in England and Wales are required to be licensed by the local authority, but the provision of the Poultry Pens, Fittings and Receptacles (Disinfection) Order, 1952 (S.I. No. 431), which requires notice of the intention to hold such an exhibition will no longer apply in England and Wales; (3) the provisions of Part I of the Order (prohibiting the holding of sales of poultry and day-old chicks and certain movements of poultry) are extended to the Scilly Isles, subject to the same exceptions and licensing provisions as are applicable to the rest of England and Wales; and (4) licences to hold sales of poultry in England and Wales may in future be granted by local authorities only for sales by auction.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

For the powers of the police with regard to this Order, see section 71 of the Diseases of Animals Act, 1950; and for penalties for contraventions, see sections 78–80 of that Act.

Copyright

COPYRIGHT ACT, 1956 (COMMENCEMENT) ORDER, 1957 (S.I. No. 863): operative May 17, 1956. The Copyright Act, 1956 (4 & 5 Eliz. 2, c. 74; [1957] Crim.L.R. 123), comes into operation on June 1, 1957.

For penalties for contraventions under the Act, see section 21 of the Act.

Customs and Excise

CUSTOMS DUTIES (DUMPING AND SUBSIDIES) REGULATIONS, 1957 (S.I. No. 864): operative May 23, 1957. Under the 1957 Act ([1957] Crim.L.R. 411) certain matters are to be taken into account in computing the " cost of production " of goods where such cost is a relevant factor in determining both the origin of the goods and whether they have been dumped. These matters are now prescribed, and it is further provided that " cost of production " is the cost to the last producer. Special provision is also made for computing the cost of carrying out separate stages in production, and the Board of Trade are enabled to take into account rebates and other forms of private subsidy.

HYDROCARBON OIL DUTIES (DRAWBACK) (NO. 1) ORDER, 1957 (S.I. No. 823): operative May 21, 1957. Various previous Orders referred to in the Third Schedule to this Order are consolidated with certain amendments. Provision is made for the allowance of drawback of customs or excise duty paid in respect of hydrocarbon oil used in the manufacture or preparation of certain classes or descriptions of articles.

Food and Drugs

EGGS (AMENDMENT) ORDER, 1957 (S.I. No. 802): operative May 14, 1957. The Order of 1953 (S.I. 1953, No. 1233, as amended by S.I. 1953, No. 1816) is further amended, so as to permit sales of eggs from producers to retailers and caterers with effect from May 14, 1957, the date on which the marketing provisions contained in Part VI of the British Egg Marketing Scheme, 1956, came into operation.

London

The following Orders have been made detailing prescribed routes: S.I. No. 791 (Redhill, Reigate); S.I. No. 821 (Harrow).

The following Orders have been made prohibiting waiting: S.I. Nos. 781 (Brasted, Kent); 782 (Woking); 792 (Walton and Weybridge).

Magistrates' Courts

The following Order has been made altering petty sessional divisions: S.I. No. 741 (Huntingdonshire).

Medicine

THERAPEUTIC SUBSTANCES (CONTROL OF SALE AND SUPPLY) REGULATIONS, 1957 (S.I. No. 798): operative June 1, 1957. The substances specified in regulation 2 are brought within the scope of Part II of the Therapeutic Substances Act, 1956 (4 & 5 Eliz. 2, c. 25; [1956] Crim.L.R. 353), which controls the sale and supply of the substances to which that Part applies.

For penalties for contraventions, see sections 6 and 12 of the Act.

PHARMACEUTICAL SOCIETY (STATUTORY COMMITTEE) ORDER OF COUNCIL, 1957 (S.I. No. 754): operative May 4, 1957. The passing of the Pharmacy Act, 1954 (2 & 3 Eliz. 2, c. 61; [1955] Crim.L.R. 53), has made necessary a revision of the existing Regulations as to the procedure to be followed by the Statutory Committee of the Pharmaceutical Society of Great Britain. The Regulations have been revised in the light of practical experience gained since the existing Regulations were made in 1942.

Merchant Shipping

MERCHANT SHIPPING (REGISTRATION OF FEDERATION OF NIGERIA GOVERNMENT SHIPS) ORDER, 1957 (S.I. No. 861): operative May 24, 1957. Provision is made for the registration of ships of the Federation of Nigeria Government as British ships for the purposes of the Merchant Shipping Acts.

Mines and Quarries

COAL MINES REGULATION (SUSPENSION) ORDER, 1957 (S.I. No. 751): operative May 1, 1957. The Coal Mines Regulation Act, 1908, as amended by subsequent enactments, limits the time during which the main categories of workmen in mines may be below ground for the purpose of their work, and of going to and from their work, to 7½ hours during any period of 24. The corresponding time for certain other categories is 8½ hours. This Order suspends the operation of the relevant sections of the Act, in so far as it applies to coal mines, on Friday afternoons and Saturday mornings for the period from the expiry of the 1956 Order (S.I. 1956, No. 622) until April 30, 1958.

Open Spaces

ROYAL BOTANIC GARDENS, KEW, REGULATIONS, 1957 (S.I. No. 710): operative May 3, 1957. Previous Regulations of 1927 (S.R. & O., No. 1178) are revoked and replaced. A number of acts within the Botanic Gardens are prohibited and for others written permission is required. Any person who contravenes the Regulations must on demand by a park-keeper or a constable give his name and address.

For penalties for contraventions, see section 2 of the Parks Regulation (Amendment) Act, 1926.

Pest Control

RED CORE DISEASE OF STRAWBERRY PLANTS ORDER, 1957 (S.I. No. 753): operative May 3, 1957. The Order of 1952 (S.I. 1952, No. 1920) is revoked and re-enacted with amendments, the principal of which enable the Minister of Agriculture, Fisheries and Food to perform certain formal functions previously given to County Agricultural Executive Committees.

For penalties for contraventions, see paragraph 10 of the Order.

PROGRESSIVE VERTICILLIUM WILT OF HOPS ORDER, 1957 (S.I. No. 752): operative May 3, 1957. The Order of 1953 (S.I. 1953, No. 776) is revoked and re-enacted with certain amendments, the principal of which enable the Minister of Agriculture, Fisheries and Food to perform certain formal functions previously carried out by the County Agricultural Executive Committees.

For penalties for contraventions, see paragraph 12 of the Order.

Petroleum

PETROLEUM (LIQUID METHANE) ORDER, 1957 (S.I. No. 859): operative June 1, 1957. The provisions of the Petroleum (Consolidation) Act, 1928 (18 & 19 Geo. 5, c. 32), are applied to liquid methane except to the extent that such provisions are inappropriate to liquid methane; in particular provisions appropriate only in the case of fuel for vehicles are not applied. The main effect is that a licence will be required to keep liquid methane; vessels containing this liquid must be properly labelled; the Secretary of

State is empowered to make regulations as to the conveyance of this liquid by road; and harbour authorities for harbours where the liquid can be loaded or landed are required to make by-laws as to ships concerned in such traffic.

For penalties for contraventions, see sections 1, 2, 5–9, 12–14, 16–18 of the Act.

Police

SPECIAL CONSTABLES (PENSIONS) ORDER, 1957 (S.I. No. 750); (SCOTLAND) REGULATIONS (S.I. No. 743): both operative in part from April 1, 1956, and otherwise from May 6, 1957. The Orders of 1955 (S.I. No. 701; Scotland No. 703), 1950 (S.I. No. 673; Scotland No. 674) and 1949 (S.I. No. 589; Scotland No. 1056) are amended. The main changes are: (1) the conditions on which a pension is payable to a widow of a special constable who was living apart from her husband at the time of his death are simplified (regulation 1 (1) (*a*)); (2) the benefits payable to the dependants of special constables are increased; (3) the periods during which a discretionary increase in the pension of a special constable's widow is payable are extended; (4) the extent of the abatement of a widow's pension by a national insurance widow's allowance is adjusted; (5) the period for which a child's allowance is payable where he is receiving full-time education or is an apprentice is extended; and (6) provision is made for an increase in certain children's allowances (regulations 1 (1) (*c*), 3 (1) (*b*) and 4 (1) (*b*)).

The effect of these amendments is generally to make similar provision in relation to the dependants of special constables as had already been introduced in respect of the dependants of members of police forces.

POLICE (SCOTLAND) AMENDMENT (NO. 2) REGULATIONS, 1957 (S.I. No. 742): operative May 6, 1957. With effect from February 1, 1957, the rates of detective duty allowance, and the scales of pay of inspectors, sergeants and constables, are increased.

Privy Council

JUDICIAL COMMITTEE (RHODESIA AND NYASALAND) ORDER, 1957 (S.I. No. 857): operative May 17, 1957. The Supreme Court of the Federation of Rhodesia and Nyasaland is named as one of the Superior Courts of Her Majesty's Dominions for the purposes of the Judicial Committee Amendment Act, 1895. The effect is that any person being or having been Chief Justice or a Judge of the Supreme Court of the Federation, and being a Privy Councillor, shall be a member of the Judicial Committee of the Privy Council.

Public Health

CLEAN AIR COUNCIL ORDER, 1957 (S.I. No. 766): operative May 8, 1957. Provision is made for the constitution and procedure of the Clean Air Council, which the Minister of Housing and Local Government is required to appoint under section 23 of the Clean Air Act, 1956 ([1956] Crim.L.R. 645).

Revenue

EXCHANGE CONTROL (PAYMENTS) (EGYPTIAN MONETARY AREA) ORDER, 1957 (S.I. 819): operative May 13, 1957. The Exchange Control (Payments) Order, 1954, is further amended by varying the arrangements for transfers to and from accounts of persons resident in the Egyptian Monetary Area, and varying the prescribed manner of payment for exports from the United Kingdom to the Egyptian Monetary Area.

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947, and regulation 92 of the Defence (General) Regulations, 1939.

Road Traffic

ROAD VEHICLES (EXCISE) (PRESCRIBED PARTICULARS) REGULATIONS, 1957 (S.I. No. 702): operative May 1, 1957. The Regulations of 1955 (S.I. No. 1665 ; [1956] Crim.L.R. 65) are revoked and replaced. New provision is made with respect to the particulars required to be furnished and the declaration to be made upon applications for excise licences for mechanically propelled vehicles.

For penalties for contraventions, see section 25 (4) of the Vehicles (Excise) Act, 1949.

ROAD VEHICLES (PART YEAR LICENSING) (AMENDMENT) ORDER, 1957 (S.I. No. 832): operative May 13, 1957. The principal Order (S.I. No. 703 ; [1957] Crim.L.R. 416) is amended so as to provide that in the case of a vehicle for which the annual rate of duty is £3 or less a licence may be taken out for any part of a calendar year commencing before October 1 and ending on December 31 in that year. Provision is also made as regards the duty payable in respect of any such licence.

PARKING METERS (DESCRIPTION AND TESTING) (ENGLAND AND WALES) ORDER, 1957 (S.I. No. 822): operative May 30, 1957. The requirements which must be complied with by parking meters used for collecting charges for the parking of vehicles on highways in

England and Wales, at parking places provided under the Road Traffic Act, 1956, where provision is made for the use of meters complying with such requirements, are prescribed. The steps to be taken by local authorities in connection with the testing and inspection of such meters are laid down.

Scotland

Police: see p. 485, above.

Telegraphy

TELEGRAPH (BRITISH COMMONWEALTH AND FOREIGN WRITTEN PRESS TELEGRAM) REGULATIONS, 1957 (S.I. No. 767): operative June 1, 1957. The 1950 Regulations (S.I. 1950, No. 1024) are revoked and replaced. The main changes are: (1) broadcasting authorities are included with newspapers and news agencies as bodies to which oversea press telegrams may be sent, provided that they are authorised for that purpose by the Postmaster-General or the oversea administration concerned; and (2) the restriction that oversea press telegrams may be sent only by correspondents or representatives of newspapers or news agencies is removed.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

32. *Principal in the second degree to larceny*

A is employed as a stockroom boy by a multiple firm. Whilst sweeping the shop he steals from the counter a carton which contains 200 cigarettes. He takes the property to the rear of the shop, and places it in a dustbin which is situated in a yard owned by the firm which employ the boy and are owners of the cigarettes. The manager of the firm is suspicious of the boy's actions, and decides to check the dustbins and he finds the cigarettes. He leaves the property in the bin, and decides to keep observation.

A finishes work, and later the same day he calls for his friend B. A tells B of the circumstances and that the cigarettes are still in the dustbin awaiting collection. He persuades B to come with him to the rear of the shop, to keep watch whilst he (A) climbs into the yard to retrieve the cigarettes. B agrees to go with A. The latter climbs the gates into the yard, and removes the cigarettes. He is caught by the manager, and B on hearing the commotion inside the yard runs away. The police are informed and A makes a voluntary statement admitting the theft and implicates B inasmuch that B helped him by keeping watch. B is subsequently seen and he too in a voluntary statement admits that he went with A to keep watch whilst the cigarettes were removed from the bin. It was their intention to share the property between them.

Whilst it is clear what charge could be preferred against A, the argument surrounding these facts is whether any charge could be made against B. The points that have been raised are that the larceny was complete on the first occasion when A stole the cigarettes and placed them in the bin. Therefore, so far as is known in these circumstances, no charge could be made against B. On the other hand, when the property was placed in the bin, was there a resumption of possession by the owner? If this is so, could not B be charged with being a principal in the second degree? [E. T.]

ANSWER

It seems clear that here the cigarettes were retaken by the manager on behalf of the owner (see *R.* v. *Villensky* [1892] 2 Q.B. 597). If that is so it follows that A committed larceny on the occasion when he removed the cigarettes from the dustbin. B is a principal in the second degree. His mistake affords him no defence, since even if the facts as he believed them were true, he would still be an accessory after the fact of A's felony. [D. W. E.]

33. *Procedure where soldier is arrested on charge of larceny*

Will you please inform me if there is anything amiss with the following procedure and, if so, the correct method of dealing with similar circumstances?

A, a soldier, is arrested on a charge of larceny and bailed to attend a local magistrates' court on a certain date. Although at the outset it was obvious that a theft had been committed, when inquiries were completed it is ascertained that the injured person is a soldier, and that the offence took place on the premises of a military barracks; it is, therefore, desirous that the military authorities should deal with the matter. A answers to his bail, and the prosecuting officer offers no evidence and makes application to the magistrates for the case to be withdrawn from them to enable the military authorities to deal with it. [J. C. F.]

ANSWERS

It is clear from the question that A has committed an offence punishable both in the ordinary criminal courts and in the military courts. There is nothing in the Army Act, 1955, or any other statute which excludes the ordinary criminal jurisdiction. The decision whether or not criminal proceedings will be taken at the instance of the police is, therefore, entirely one for the Chief Constable. Home Office circular 157/1951 indicates the factors to be taken into account by the Chief Constable in deciding whether a military offender is to be tried. As the questioner indicates, it is generally desirable, in the absence of special circumstances, that offences committed by soldiers which do not affect the person or property of civilians should be dealt with by service tribunals. Normally, therefore, it would be expected that A would, upon arrest, be kept in custody and handed over directly to an appropriate military unit in order that the case may be dealt with by court-martial. If, however, as seems to be the case here, it was not apparent at the time of arrest that only the property of another soldier was concerned, and the arrested soldier has meanwhile been bailed to appear at a civil court for trial, the only course to be taken is for the prosecuting officer to offer no evidence and to apply to the magistrates for the offender to be discharged; he could then be handed into military custody.

If possible, of course, it would be better to avoid the appearance at the magistrates' court altogether, by keeping the soldier in custody until the facts are known, or to bail him to attend at the police station at a later date. Indeed, it may be thought premature to charge a man at all until the venue of the offence and the identity of the injured party is known. [N. W.]

Letters to the Editor

Questioning of Accused Persons by Medical Officers

Sir,

A somewhat alarming tendency in the administration of the criminal law of this country appears to be manifesting itself at the present time.

Recently a client was accused of murder. After he had been committed for trial he was examined by psychiatrists—apparently several of them—and also by one of the Prison Medical Officers. Admittedly there is nothing sinister in this but in each case the person carrying out the examination discussed the case in detail with the prisoner—without his legal adviser being present—and then wrote a long report running to several foolscap sheets referring to the prisoner's version of the crime, his sex life and family history. In the final paragraph each of the reporting officers gave his conclusions based on the McNaghten Rules that the prisoner was fit to plead and sane.

A copy of these reports was then sent to the Director of Public Prosecutions and through him to my firm as solicitors for the prisoner.

The disquieting feature of this procedure seems to be that after committal the prisoner is subjected to close questioning which may tend to incriminate him without the right of legal representation. If this were done by a police officer it would be a clear breach of the Judges' Rules. Nevertheless, prosecuting counsel at the trial is in possession of the information thus obtained and it is asking a great deal to suppose that his cross-examination may not be coloured—at least subconsciously—by the knowledge he has thus gained.

It seems that the modern zeal for examining the mind of the prisoner is liable to cause serious injustice. In the case of both the reports in the case in question the final paragraph dealing with the state of the accused man's mind was all that was necessary to be published to the prosecution or the defence.

Yours faithfully,
PETER G. SMITH.
Solicitor.

Reading, Berkshire.

Books and Periodicals

Reviews:

Jervis on The Office and Duties of Coroners. With Forms and Precedents. Ninth edition. By W. B. Purchase, C.B.E., M.C., M.B., D.P.H., Barrister-at-Law, Coroner to H.M. Household and County of London, and H. W. Wollaston, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1957. xxiv and 255 and (appendices and index) 311. (84s. net.)

Umfreville's classical work on coroners published in 1761 mentions medical evidence on no more than two of its 500 odd pages, and when Sir John Jervis wrote his now famous book in 1829, there was still no provision whereby coroners might pay for post-mortem examinations or other medical evidence. In the meantime the coroner's inquiry into sudden death has been transformed from a curious relic of the medieval period into a scientific medico-legal investigation. Few institutions can have suffered more uninformed criticism in recent years than the coroner's office, and the joint editors of the new edition of Jervis have shown commendable restraint in not pointing this out. In fact, as they imply in the preface, the main cause for concern is the wide variation in practice of individual coroners in ordering post-mortem examinations and holding inquests. They illustrate these differences with some interesting statistics, which confirm the findings of an independent survey which has since been published in the *Criminal Law Review* ([1957] Crim.L.R. 15).

Until Mr. Purchase took over the reins in 1946 Jervis had been appearing for nearly half a century in the form of a rather dry and uninspired commentary on the Coroners Acts. In this edition he has joined with Mr. Wollaston in producing a most readable and interesting text, while any flagging interest is revived by the introduction at the beginning of each chapter of suitable quotations from literary classics, in the selection of which the editors have been surprisingly successful in avoiding the macabre. The most striking feature of this new edition is the increase in size, the 300 pages of appendices overshadowing the 255 pages of text. In fact, the reprinting of relevant portions of statutes, statutory instruments and Home Office circulars alone occupies almost as many pages as the text. While it is most convenient to have this information collected together, the result has inevitably been to price the book out of a more popular range in which it might have enjoyed the sale it undoubtedly deserves.

The chapter on post-mortem examination and medical evidence is the most notable addition to the book, and one which it is hoped that coroners will study closely. It is unfortunate that it does not refer to the considerable medical literature which has appeared on this subject recently. According to figures given by the editors, more than 90 per cent. of coroners are without medical qualifications, so that few coroners can be expected to be familiar with the medical journals. It seems, therefore, that at least a bibliography might have been added. A case in point is that several independent research workers into infant "crib deaths" have shown that careful autopsy will often reveal a "natural" cause of death, *e.g.*, septal pneumonia, notwithstanding circumstantial evidence to the contrary. Much inaccuracy and possibly injustice has resulted from verdicts of mechanical suffocation being pronounced at inquests on these cases where no autopsy has been carried out; yet the editors do not mention this point. Spilsbury (1934) once described inquest findings in the absence of autopsy as "merely guess-work," and it is disturbing to see from the tables given in the appendix that there were 9,321 inquests held without post-mortem in 1953, and that one coroner managed to hold 22 inquests with only one post-mortem.

As might be expected of an ancient institution, much of the difficulty experienced with matters concerning coroners' jurisdictions can be explained only by historical reasoning. The editors are at a considerable disadvantage in that no authoritative statement exists on the history of the office of the coroner, and they have been compelled to rely on several authorities of doubtful accuracy. This is particularly noticeable in their brave attempt to deal with the important distinction between "natural" and "unnatural" death, a problem which had been conveniently ignored in previous editions. The section dealing with the indictable misdemeanour of wilfully preventing the coroner from holding an inquest requires more attention. While we are indebted to the editors for noticing the unreported judgment of Glyn-Jones J. in *Pearson* (1954) Newcastle Assizes, it seems strange, that with only five unreported cases on the offence in the last 200 years, the case of *Osbourne* (1922) 153 L.T.J. 244, which contains some important observations by Avory J. (as he then was) should have been omitted as in previous editions. *Bond* (1717) 1 Stra. 22 continues to be cited in connection with this offence whereas it is authority only for the outmoded question of the length of time after which exhumation will be allowed. *Purcy* (1933), the most recent English decision on the offence is cited as reported in the *Law Times* reports to the exclusion of the fuller reports of the case in the *Criminal Appeal Reports* (24 Cr.App.R. 70). This kind of thing is noticeable elsewhere in the book, *e.g.*, *Re Beresford* (1952) 36 Cr.App.R. 1, is cited only as reported in the *Justice of the Peace* reports. The citation of parliamentary papers leaves something to be desired, and in some instances the reader is given no indication where the relevant passages may be found in a departmental or select committee report. These points are relatively unimportant, and their mention is inspired only by the general high quality of the book.

No doubt the editors felt that the book was already overloaded, but it would have added considerably to its interest if a note on medico-legal investigative systems of other countries had been included. On the other hand it is difficult to see why it is still considered necessary to include a chapter on the law of homicide. It is impossible to do justice to the subject in the space allotted, and the editors themselves recommend that textbooks on criminal law should be consulted over "complicated" questions of law or fact. It is to be hoped that coroners are sufficiently acquainted with the law of homicide not to need the potted version provided by the editors. The section on the law of evidence will do much to dispel misgivings over its operation in coroners' courts. The editors deal very cautiously with the conflict between medical ethics and the duty to notify the coroner, in spite of the almost unique attitude of our own medical profession, which was once described from across the Atlantic as representing " a triumph of medical altruism over legal duty."

The unassailable reputation of " Jervis " for reliability and accuracy is preserved in this, the best edition yet of the standard work on coroners. Books on legal medicine and allied subjects abound with inaccurate statements concerning inquests, death certification, etc. " Jervis " is unique in providing a completely reliable and authoritative statement of the present state of the law.

J. D. J. HAVARD.

Police Law. An arrangement of law and regulations for use of police officers. Fourteenth edition. By Cecil C. H. Moriarty, C.B.E., LL.D. London: Butterworth & Co. (Publishers) Ltd. 1957. xx and 549 and (tables and index) 68 pp. (15s. net.).

The publication of a new edition of *Police Law* by C. C. H. Moriarty must be considered in police circles to be an event of some consequence.

Prior to the publication of Dr. Moriarty's first edition in February, 1929, there existed a dire need among police officers for a legal textbook which would not only set out the law simply and concisely, with an absence of complicated footnotes, but, equally important, would provide essential and rapid pointers to police powers and action. " Moriarty "—to give its popular title—has filled that need. In effect, no better testimonial to the value of this book can be quoted than the fact that " *Police Law* " remains the standard work for instruction at police training centres in this country.

The author's preface to the fourteenth edition ends with the sentence: " *Owing to the many and recent changes in the law, the work of revising this book, especially the parts dealing with motor traffic law, has been difficult and protracted.*" Road Traffic Law is dealt with by Dr. Moriarty in Part V of his book under the chapter headings, " Traffic " and " Road Vehicles." In both these chapters the changes to which he refers have necessitated many amendments. These have been done, however, very efficiently and a clear picture of the current changes brought about by the Road Traffic Act, 1956, can be gained by the reader.

Other new legislation dealt with by the author includes the Sexual Offences Act, 1956. In this connection, a chapter under the heading " Offences Against Females " reveals the clarification brought about by the repeal of the Criminal Law Amendment Acts relating to sexual offences. Also of interest to the police are references to the Children and Young Persons (Harmful Publications) Act, 1955, and the Small Lotteries and Gaming Act, 1956.

A new appendix (Appendix V) is concerned with the law relating to visiting forces.

CHARLES EDWARD DYER.

Sexual Offences. A Report of the Cambridge Department of Criminal Science (Vol. IX of English Studies in Criminal Science, edited by L. Radzinowicz). London: Macmillan & Co., Ltd. 1957. xxvii and 514 and (appendices and tables) 37 pp. (63s. net.)

The inadequate and therefore misleading nature of criminal statistics being what it is, much of the argument about penal reform is conducted in a vacuum. The Department of Criminal Science of the Faculty of Law of Cambridge University has sought to remedy this in one field by providing extremely detailed statistics based on a study of 3,000 sexual offences which came to light in the year 1947. The greater part of this book consists of tabular statements classifying offences, offenders and victims in almost every conceivable way. Connecting and explanatory matter is kept to a minimum, but indeed the figures speak for themselves, and often in startling fashion. We learn, for instance, that the number of indictable sexual offences rose by 252 per cent. from 1937 to 1954, and that since the war, homosexual crime has increased at twice the rate of heterosexual crime. Even if some of this increase is accounted for by an increased proportion of offences detected, there remains some grounds for alarm, the more so when it is realised that 82 per cent. of the victims were under sixteen years of age.

Painstaking though the statistics in the survey are, the director of the project is the first to admit that their utility is limited. In an interesting preface, Dr. Radzinowicz estimates that detected offences account for no more than 5 per cent. of all those committed, so that any conclusions that one might be tempted to draw about the submerged bulk of the iceberg can only be speculative.

Two extremely well written chapters survey the present law of sexual offences, most of which has been codified by the Sexual Offences Act, 1956, and those rules of evidence which are peculiar to sexual offences, such as corroboration and complaints. They are followed by a section on the reform of the law and the treatment of offenders. Here it is perhaps to be regretted that in some cases the authors content themselves with setting out the various suggestions which have been made at different times, without coming down in favour of any particular reform. They rightly castigate such obvious anomalies as the fact that the defence of reasonable belief in age is sometimes available to a young man charged with the full offence of sexual intercourse with a girl under the age of sixteen, but never if he is charged merely with indecent assault, even if the only assault is the sexual intercourse; but as to whether the defence ought to be allowed at all in cases concerning young girls, they offer no opinion. Other topics which are considered but about which the book does not make any clear recommendation, are homosexual conduct between consenting adult males in private, corroboration of unsworn evidence from a child by similar evidence from another child, and the duty of the court to sit *in camera* when hearing evidence from children in sexual cases. Nevertheless, several excellent suggestions for reform are made, notably the creation of a new offence of indecent conduct with children to augment that of indecent assault, which is often artificial and sometimes inadequate, as shown by the well-known case of *Fairclough* v. *Whipp*.

On the treatment of offenders, the authors rightly disparage the arbitrary scale of punishments provided by the present law, and then tackle the problem of what to do with sexual offenders after they have been sentenced. They dispose of the fallacy that the majority of such offenders are " queer " or recidivists (in fact, most of them have never been convicted before) and then point out the difficulty of classifying offenders into sexual and others for the purpose of giving special treatment to the former. Quite often a man with a long string of "other" convictions suddenly collects one for a sexual offence; and again, in many cases of "other" convictions, such as arson, larceny and malicious damage, the motive of the criminal is a sexual one. Subject to this problem of definition, the authors on the whole favour prolonged detention in suitable institutions, or pending the building of such places, in ordinary prisons provided that psychiatric treatment is given.

The book ends with surveys of the present position in the Scandinavian countries and the U.S.A.

Altogether it may be said that the team which produced this work well deserve, and will no doubt receive, the thanks of all those interested in the problems of reform in this particular field.

D. W. ELLIOTT.

The Delinquent Child and the Community. By Donald Ford. London: Constable. 1957. xii and 200 and (bibliography and index) 4 pp. (24s. net.)

In the realm of juvenile delinquency there exists an unhappy lacuna between theorists and workers with practical experience. Most successful books have been written from one side or the other, and the gap remains unbridged. Mr. Ford makes a declared attempt to relate delinquency to the modern pattern of man's life and concerns himself with this aspect as much as with the individual problems. The weakness of the book lies in the breadth of an unevenly tackled subject.

Mr. Ford is easily at his best when describing institutions of which he has practical knowledge. I thought the chapters dealing with Approved Schools by far the most interesting. Mr. Ford frankly dislikes Detention Centres, and gives cogent reasons for his point of view. He supports pre-trial inquiries rather than an adequate remand procedure after a finding of guilt. This is a factual study rather than a reformer's survey, but Mr. Ford gives support to Sir Basil Henriques' plea for a Ministry of Children which would take heed of all the needs of a child and treat him as a complete person.

JEAN GRAHAM HALL.

Books Received:

The Lion and the Throne. The life and times of Sir Edward Coke, 1552–1634. By Catherine Drinker Bowen. London: Hamish Hamilton. 1957. xiv and 463 and (notes, acknowledgments, sources, index) 67 pp.

Battle for the Mind. A Physiology of conversion and brainwashing. By William Sargant. London: Heinemann. 1957. xxiv and 236 and (bibliography and index) 12 pp. (25s. net.)

Sabotage is Suspected. By John Baker White. London: Evans Brothers Ltd. 1957. 217 and (index) 7 pp. (16s. net.)

The Tichborne Claimant. By Douglas Woodruff. London: Hollis & Carter. 1957. 467 and (index) 11 pp. (30s. net.)

The Mind of the Murderer. By W. Lindesay Neustalter. London: Christopher Johnson. 1957. 223 pp. (25s. net.)

This Friendless Lady. By Nigel Morland. London: Muller. 1957. 254 pp. (18s. net.)

Behind the Face of Crime. By Laurence Wilkinson. London: Muller. 1957. 224 pp. (16s. net.)

The World's Strangest Murders. By Bernard O'Donnell. London: Muller. 1957. 223 pp. (15s. net.)

Famous Australasian Crimes. Tom Gurr and H. H. Cox. London: Muller. 1957. 192 pp. (13s. 6d. net.)

Evidence in Criminal Cases. By F. L. Bunn. London: Sweet & Maxwell, Ltd. 1957. 96 and (index) 20 pp. (10s. 6d. net.)

Readers' Digest:

Affray: *Royal Ulster Constabulary Gazette*, May, 1957, p. 43.

Appeal: The Blackburn Case: 101 *Solicitors' Journal* 381.

Desertion: Rewards for arrest and punishment for desertion: 121 *Justice of the Peace* 306.

Evidence: Calling the accused to give evidence: 101 *Solicitors' Journal* 419.

Evidence: Evidence of former offences: 223 *Law Times* 271.

False pretences: Pretence not made orally: *Royal Ulster Constabulary Gazette*, May, 1957, p. 43.

Magistrates' courts: Forfeited recognizances: 121 *Justice of the Peace* 325.

Magistrates' courts: Depositions cases: 121 *Justice of the Peace* 339.

Magistrates' courts: The office and duties of a clerk to the justices: 54 *Law Society's Gazette* 259.

Magistrates' courts: Third party proceedings: 101 *Solicitors' Journal* 435.

Prostitution: Rent from immoral earnings: 101 *Solicitors' Journal* 387.

Road traffic: The drugged motorist: 19 *Scots Law Times* 95.

Road traffic: Speed limits: 101 *Solicitors' Journal* 364.

THE
CRIMINAL LAW
REVIEW

Editors
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Barristers-at-Law

Editorial

The study of criminology

A recent report of the United Nations Educational, Scientific and Cultural Organisation[1] has shown that criminology is very much a Cinderella in the educational world, with social science and criminal law as its elder, domineering sisters.

In the United Kingdom the tendency has been to treat the science of crime as a branch of social science. No United Kingdom university has a chair in criminology, although Oxford and London have Readerships and Cambridge has a Department of Criminal Science in the Faculty of Laws, with a Director at its head. Other universities and university institutes provide anything from occasional lectures to full courses in various aspects of criminology, but there is no separate qualification, such as a diploma, in criminology as such. Some aspects of the subject are taught by Government training establishments with courses for police, probation and prison officers. The research aspect, however, appears to be neglected by all but the three universities already mentioned, and one or two private institutes such as the Institute for the Study and Treatment of Delinquency and the Howard League for Penal Reform. To these must now be added the Home Office Research Department, which is particularly concerned with penology.

The United Kingdom is not, however, alone in its lack of co-ordination in the criminological field. The UNESCO report shows that the teaching of criminology in the United States is run on very much the same lines as it is in the United Kingdom.

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[1] *The University Teaching of Social Sciences: Criminology.* UNESCO. Obtainable from the Stationery Office at 10s. 6d.

There is the same tendency for the subject to be very strongly integrated in the social science or sociology departments; the same separation between the universities and the training of prison, police and probation officers. The large number of university courses and institutes available, however, has resulted in considerably more emphasis being placed on intensive specialised training.

The Continental approach to the problem is somewhat different, arising partly from the high degree of State control in Continental universities. The training of police and prison officers is, as a result, often dealt with by the university institutes. Another result is that subsidiary subjects, such as scientific police methods, forensic medicine and judicial psychology, are more widely studied than they are in the United Kingdom. The accent in the teaching of criminology in Continental countries is thus placed on its relationship and affinities to law rather than sociology. Yet another result of this high degree of State control seems to be that criminology is more often recognised as a subject in its own right, with its own university chairs, diplomas, and teaching certificates.

In view of the comparatively sad state of affairs in this country we welcome the news that the Howard League for Penal Reform, whose work in this field is already considerable, has written to the Secretary of State for Home Affairs, Mr. R. A. Butler, suggesting the establishment of a Central Institute of Criminology. The Howard League takes the view that such an institute " could do much valuable work in co-ordinating the teaching of, and research in, a subject which is in some danger of disappearing with the actual or eventual retirement of a few well-known criminologists."

The Howard League suggests London as an appropriate location for such an institute. If it were to be part of the University of London, the Board of Management would include representatives of Oxford, Cambridge, and other interested universities. The Howard League proposes concentration in the first instance on postgraduate work, with a view to stimulating the teaching of criminology to graduate standard in the universities. The provision of a qualification in criminology for persons concerned with the administration of justice, the treatment of offenders, and the prevention of crime would follow, while the present courses for magistrates, policemen, probation and prison officers could be co-ordinated by the institute.

While emphasising the tentative nature of these detailed proposals, the Howard League feels that, if Mr. Butler, whose interest in criminological research has already become apparent, were to approach the appropriate bodies, an encouraging response would follow. We endorse this view wholeheartedly.

Lastly, the UNESCO report, in drawing attention to the considerable lack of co-ordination in the internal study of the science of crime, reveals an almost complete lack of co-operation in the international field. The international exchange of knowledge, encouraged by the International Society for Criminology, and assisted by an improved documentation of research results, etc., could have very beneficial results for all countries participating in such a scheme.

Preliminary hearings in magistrates' courts

The power of examining justices to hear in private proceedings preliminary to trial on indictment was considered at [1957] Crim. L.R. 277. The names of the members of the Departmental Committee referred to therein were announced by the Home Secretary to the House of Commons on June 4. At the same time the Home Secretary announced that the Committee's terms of reference have been amended and now read as follows: " To consider whether proceedings before examining justices should continue to take place in open court and, if so, whether it is necessary or desirable that any restriction should be placed on the publication of reports of such proceedings; and to report."

The Committee, under the chairmanship of Lord Tucker, held its first meeting on June 25, and is now ready to receive evidence from bodies and individuals. The evidence should be sent in the form of a memorandum to: The Secretary, Mr. B. C. Cubbon, Home Office, Whitehall, S.W.1.

Maintenance and affiliation proceedings

The Home Secretary has directed that information contained in social security records held centrally by Government Departments may now be disclosed to magistrates' courts to assist the service of process in proceedings under the Summary Jurisdiction (Separation and Maintenance) Acts, and the Bastardy Laws Amendment Act. For details, see Home Office Circular No. 113/1957, [1957] 1 W.L.R. 810.

Radar for detection of speeding

The use of radar equipment for the detection of speeding offences by motorists is to be demonstrated at Lancashire county police headquarters, according to a report in *The Times*, July 16. The report goes on to say that a Home Office Official, speaking of the experimental nature of the equipment, said that it could only be used on a " longish stretch of straight and wide road " where there were few vehicles to confuse the graphs. Since these are the conditions in which driving at a speed exceeding the legal limit is least likely to involve danger to other road users, the usefulness of the equipment seems questionable.

Smooth justice

A boy who had been beaten up by eight other boys had to have his head shaved so that his injuries could be treated. When the culprits appeared before the Juvenile Court in Gary, Indiana, U.S.A., Judge Joseph Meszar, who is apparently unaware of the popularity of baldness since the rise to cinema stardom of Mr. Yul Brynner, ordered the gang to get their heads shaved. When they reappeared in court, only one boy had obeyed the order in full; the rest had crew cuts. Thereupon the judge handed out twenty dollars to have the job done properly. He also put each boy on probation for two years.

The Homicide Act in Scotland

Scottish legal practice has rendered inadmissible pleas of guilty in capital offences, which have always gone to trial. On July 1, however, the High Court accepted as valid an admission of guilt in terms of the Homicide Act under which murder is classified either as a capital or non-capital offence. In the case of Malcolm McNaughton the non-capital category was applied and he was permitted to enter a plea of guilty to charges of triple murder. He received a sentence of life imprisonment.

In the swim

Following a suggestion of their Chief Constable, Mr. M. McCulloch, the Glasgow police force is to have an underwater swimming unit. The cost of training and equipment is estimated at £402.

Obstruction and the learned constable

On June 12 Sir Laurence Dunne, the Chief Metropolitan Magistrate, dismissed a summons against a motorist for causing an obstruction, where the motorist had left his car on the highway for thirty-three days. Sir Laurence stated that he must have some evidence of obstruction. The police constable who laid the information said that he thought that the Lord Chief Justice had held that any vehicle occupying a position for a long period caused an obstruction. Sir Laurence said that he did not know of such a case.

The following day Sir Laurence admitted that he had been wrong in dismissing the summons, and that the constable, who deserved to be called the "learned constable," had been right in thinking that the Lord Chief Justice had dealt with the point. The case in question was *Solomon* v. *Durbridge* [1956] Crim.L.R. 276. After re-reading the judgment, Sir Laurence said that there were two points which he ought to have considered. They were:—

Was there something which was in the nature of a physical obstruction in the road?

Was the person who caused that physical obstruction to be there guilty of an unreasonable use of the high road?

In the case which he had dismissed both these questions could be answered in the affirmative. Of the motorist, all that Sir Laurence could say was that he was a " very lucky man."

United States civilians abroad

The Supreme Court on June 10 ruled that American citizens stationed in sixty-three foreign countries with members of the armed forces are not subject to trial by court-martial. The ruling, which at present applies only to capital crimes, will secure the permanent discharge of Mrs. Clarice Covert, who was tried in England four years ago for the murder of her husband. Her conviction was reversed by the court of military appeals on a technicality and she was awaiting a new trial at Bolling Air Force base.

Parliament

Murder statistics

The number of murders recorded as known to the police in England and Wales in each of the first five months of 1957 was: January, 13; February, 13; March, 21; April, 27; and May, 21. These figures may include cases subsequently found not to be murder. In addition, one case of manslaughter was recorded in March which, before the passing of the Homicide Act, would have been recorded as murder. (H.C. Debates, Vol. 572, col. *47*, June 27.)

Judicial appointments

Mr. John Constantine Phipps has been appointed Recorder of the Borough of Gravesend.

Sir David Arnold Scott Cairns, Q.C., has been appointed a Commissioner of Assize on the Midland Circuit.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Tapping Telephones and Opening Letters

The decision of Lord Tenby, then Mr. Gwilym Lloyd-George, to hand transcripts of private telephone conversations to the Chairman of the General Council of the Bar provoked, among other things, so many mis-statements of the law [1] that it may be useful to examine the legal aspects not only of the particular case involved in his decision, but also of the much wider issues on which, as a result of it, the Prime Minister asked a Committee of Privy Councillors [2] to advise him.

It will be recalled that in the particular case Post Office officials, acting in pursuance of a warrant addressed to the Postmaster-General by the Home Secretary, recorded conversations on a private telephone line and handed transcripts of them to the police, who, on the express instructions of the Home Secretary, first showed them to the Chairman of the Bar Council and then, at his request, handed them over to him.[3] The wider issues on which the Committee of Privy Councillors were asked to advise were, so far as they are relevant for the purposes of this article:

> " To consider and report upon the exercise by the Secretary of State of the executive power to intercept communications and, in particular, under what authority, to what extent and for what purposes this power has been exercised and to what use information so obtained has been put."

There can be no doubt about the authority under which Lord Tenby purported to act: until June 27 at least, when Mr. Butler indicated to the House of Commons that he was about to take the advice of the Law Officers, the Home Office acted on the view that the executive power to intercept communications derived from the Prerogative. It seems an odd exercise of the Prerogative that enables one Minister of the Crown to interfere with the exercise of the statutory functions of another and, as its existence has never been called in question before the courts, it is fortunate that at the same time Mr. Butler indicated also the basis of the Home Office view when, in answer to a Supplementary Question, he said:

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[1] One layman suggested that the Home Secretary should be prosecuted, and another that he should be sued for damages, in respect of the acts of his predecessor. The legal correspondent of one periodical stated that " Parliament has never recognised the legality of telephone-tapping " ; and the legal correspondent of another described the privilege attaching to professional communications as " absolute."

[2] Sir Norman Birkett, Lord Monckton and Mr. Patrick Gordon-Walker, M.P.

[3] See the Home Secretary's statements in the House of Commons on June 7 and 27.

> "I am satisfied that my predecessors have exercised this power from the very earliest time, not only in respect of letters but also telegrams and, after the *Edison* case, in relation to telephones—that is for many years." [3a]

It seems reasonable to infer that the power to intercept telephone conversations has been regarded as analogous to, and perhaps also as deriving from, the power to intercept letters and, since the power to intercept letters appears on the face of it to be governed by statutory provisions, that those provisions have been regarded as declaratory of an existing prerogative right.[4]

The analogy with opening letters

The statutory provisions are (a) section 9 of the Crown Proceedings Act, 1947, which preserves (subject to exceptions which in the present context are immaterial) the Crown's exemption from liability in tort in respect of both postal packets and telephone communications, and (b) section 58 (1) of the Post Office Act, 1953, which, after enacting that it is an offence for an officer of the Post Office, contrary to his duty, to open, detain or delay any postal packet in course of transmission by post, provides in effect that it shall be a good defence for him to show, *inter alia,* that he was acting in obedience to an express warrant of the Secretary of State. In these circumstances it is pertinent to inquire precisely what prerogative right the Crown asserted before, in section 40 of the Post Office (Revenues) Act, 1710,[5] Parliament enacted the provisions now found in section 58 (1) of the Post Office Act, 1953. The answer to this question, which is to be found in the Reports of the Committees set up by both Houses of Parliament in 1844 [6] to inquire into the state of the law in respect of the detaining and opening of letters at the Post Office, admits of no doubt: throughout the sixteenth, and the first half of the seventeenth, century the Crown asserted a prerogative right to a monopoly of carrying the letters of its subjects to which the right of inspection was regarded as a natural incident.[7] It did not, that is to say, claim—as such—a right to inspect letters; it claimed a right to carry them—and that claim was, as a matter of historical fact, made for the express purpose of inspecting their contents.

[3a] H.C. Debates, Vol. 572, col. *419*, June 27.

[4] *Att.-Gen.* v. *De Keyser's Royal Hotel* [1920] A.C. 508. There is of course no reason why an Act of Parliament should not be construed as merely declaratory of the Prerogative; see, for a not very recent example, the Statute Prerogativa Regis (Ruffhead, 17 Ed. 2, St. 1).

[5] Subsequently re-enacted, without material amendment, in s. 25 of the Post Office (Offences) Act, 1837, and consolidated in s. 56 of the Post Office Act, 1908.

[6] Vol. XIV of Parliamentary Papers for 1844. The Committees were appointed as the result of protests in Parliament about the interception of Mazzini's correspondence.

It is now a commonplace of history, not only that the Crown's claim to a monopoly proved to be ill-founded in law,[8] but that the failure of the claim led to the first legislation "erecting and settling one general Post Office." The mere fact that legislation was found to be necessary indicates that the claim of a prerogative right to intercept letters was also ill-founded, for, if such a right had been exercisable by the Crown, there would plainly have been no need to create a statutory monopoly. It is particularly significant that the first Act establishing the Crown's exclusive right to carry the posts—it was in fact an Ordinance passed during the Commonwealth in 1657—recited that the monopoly had the great advantage that it made it possible "to discover and prevent many dangerous and wicked designs which have been and are daily contrived against the peace and welfare of the Commonwealth, the intelligence whereof cannot well be communicated but by letter of escript." The substantive provisions of this Ordinance were reproduced in the Post Office Act, 1660, which is in law the statutory origin of the Post Office and the result of which, it is suggested, was to vest in the officials of the post an implied statutory right to open and inspect the letters entrusted to them.

This view is confirmed by the Proclamation of May 25, 1663, announcing the appointment of one of the first Postmasters-General; by the terms of section 40 of the Post Office (Revenues) Act, 1710, itself; and by the provisions enacted in respect of postal systems outside the Postmaster-General's monopoly.

The Proclamation, foreshadowing subsequent statutory provisions, read in part:

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[7] See in particular the Proclamation of April 26, 1591, ordering the seizure of dispatches passing to and from (as distinct from within) the realm and the Orders in Council of November 22, 1626, and February 24, 1627, permitting the Merchant Adventurers to carry their own dispatches but requiring them to submit for the inspection of the Secretaries of State such letters and packets as were demanded by them.

[8] In 1846 the House of Lords appointed a committee to consider the validity of Letters Patent appointing a Master of the Posts with an exclusive right to carry all inland letters. The committee was advised by two judges, who expressed the opinion that the Letters were valid in so far as they appointed, and conferred powers on, the Master of the Posts but void in so far as they purported to establish a monopoly. They advised expressly that an Act of Parliament was necessary to establish an exclusive right.

> "And we do further charge and command that no postmasters, or other officers that shall be employed in the conveying of letters, or distribution of the same, or any other person or persons of quality or condition soever they be, except by the immediate warrant of our Principal Secretaries of State, shall presume to open any letters or paquets not directed unto themselves . . ." [9]

This provision can, of course, have been in law no more than an instruction or exhortation addressed to its servants by the Crown: if it was not then an offence for a postmaster to open a letter, the Proclamation could not make it one; if, on the other hand, it was an offence, the Proclamation could not provide an effective defence to it.[10]

Section 40 of the Act of 1710 prohibits the opening, detaining or delaying of letters and packets "except by an express warrant in writing under the hand of one of the principal Secretaries of State [11] for every such opening, detaining or delaying." This provision does not of course create in a Secretary of State any right to issue a warrant, for the excellent reason that every Secretary of State has as much right as any other natural person to issue a warrant; nor, for the reasons given above in connection with the Proclamation of 1663, can the section be construed as recognising the warrant as having any authority: the true effect of the section, it is suggested, is that, proceeding on the well-founded assumption that the Secretary of State has power to issue a warrant, it provides that his warrant shall be a good defence to a charge of an offence which has itself been created by the section.[12]

Parliament has always acted on the basis that communications exempt from the Postmaster-General's monopoly by virtue of section 3 of the Post Office Act, 1953, and section 5 of the Telegraph Act, 1869, are not subject to any prerogative right of interception. The most striking example [13] is afforded by section 4 of the Official Secrets Act, 1920, which enables a Secretary of State, by warrant under his hand, to require the production of telegrams sent to or from any place out of the United Kingdom. It is scarcely credible that a prerogative power to intercept communications for security and police purposes should, if it existed at all, not be exercisable in respect of such communications; yet if it was so exercisable, this provision (which, it will be noted, was enacted immediately after the war of 1914–1918) would have been unnecessary.

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[9] The Act of 1660 authorised the appointment of a Postmaster-General by Letters Patent. It was the custom, between 1660 and 1710, to announce the appointment in a Royal Proclamation which recited the terms on which he held his office. This was the only Proclamation containing a provision of this kind.

[10] *The Case of Proclamations* (1611) 12 Co.Rep. 74.

[11] It was not until 1837 that the Postmaster-General became a Minister of the Crown and it was, therefore, natural that Parliament should require the authority of a Secretary of State to justify the interception of a postal packet.

[12] It is on this account that references to *Entick* v. *Carrington* (1765) 19 St.Tr. 1029, are thought to be misplaced. The warrants which fell to be considered in that case purported to authorise something, *viz.*, a trespass, that was otherwise unlawful. A warrant issued by a Secretary of State under s. 40 of the Post Office (Revenues) Act, 1710, authorised an act that was in any event lawful.

It is in any event difficult to see within what field the Royal Prerogative could have operated. In the first place, as was recognised by Lord Mansfield, " the Post Office is a branch of revenue and a branch of police created by statute and there is no analogy between the Postmaster and a common carrier " [14] and one would not, therefore, expect it to be subject to any prerogative right appropriate only to common carriers.

But however that may be, the Prerogative " can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys with any of his subjects " [15] and, since the ordinary rule is that a natural person may do whatever the law does not prohibit, it follows that there is room for the exercise of the Prerogative only in relation to acts otherwise unlawful if done by a natural person. But before 1660 no criminal offence was committed by the postmaster who opened a letter on the instructions of his superiors [16]; there was no contract on which he could be sued [17]; it cannot be supposed that the Prerogative could have been successfully relied on as a defence to proceedings (in, for example, defamation) arising out of the publication of an opened letter and, in view of the terms on which the Crown publicly and persistently announced its intention of carrying the post, no other action in tort (such as, to take one instance, an action in respect of trespass to the packet itself) would have been maintainable.[18]

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[13] See also s. 52 of the Telegraph Act, 1863, which authorises the Secretary of State to take possession or assume control of privately operated telegraphs " where an emergency has arisen in which it is expedient for the public service that Her Majesty's Government should have control over the transmission of messages by the Company's telegraphs."

[14] *Whitfield* v. *Lord Le Despencer* (1778) 2 Cowp. 754, at 764. The judgment continued, " As a branch of revenue, there are great receipts . . .—As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown."

[15] 1 Bl.Com. (14th ed.) 239; and see Finch, *Discourse on the Law*, Book ii, p. 85, and Comyns' *Digest*.

[16] *Supra*, p. 504, and n. 10.

[17] See *Triefus* v. *Postmaster-General* [1957] 3 W.L.R. 1; *Whitfield* v. *Lord Le Despencer* (1778) 2 Cowp. 754; *Lane* v. *Cotton* (1701) 1 Ld.Raym. 646.

It is clear then that the opening, delaying or detaining of letters for security or police purposes is lawful. It is suggested, however, that the true view is, not that the Prerogative authorises the opening of them, but that the implied statutory right to open is subject only to a prohibition to which the Secretary of State's warrant provides a defence and that, since the prohibition itself is statutory, the effect of the warrant cannot derive from the Prerogative.

Privacy of conversation

Since the overhearing of a conversation, whether it is carried on by telephone or not, is not (unlike the opening of a postal packet) prima facie unlawful,[19] it might be thought that there is no true analogy between the interception of postal communications and the recording of telephone conversations. The law is, however, strikingly similar. The ordinary telephone subscriber does not now enter into any contractual relationship with the Postmaster-General[20]; section 9 of the Crown Proceedings Act, 1947, applies to telephonic communications as it applies to the carrying of postal packets; and section 20 of the Telegraph Act, 1868, makes it an offence for a Post Office official, contrary to his duty, to disclose or make known or intercept the contents of any telegraphic messages.[21] The section contains nothing analogous to the proviso to section 58 (1) of the Post Office Act, 1953, but provides that "the Postmaster-General shall make Regulations to carry out the intentions of this section and to prevent the improper use by any person in his employment or acting on his behalf of any knowledge he may acquire of the contents of any telegraphic message." No

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[18] Such an action would have been met by a plea of *volenti non fit injuria.*

[19] Eavesdropping is not *per se* an offence, but in certain circumstances (not thought to be relevant in this context) eavesdroppers may be required to find surety for good behaviour under the Justices of the Peace Act, 1361.
The person who intercepts wireless messages transmitted by police or fire services infringes the terms of his licence and is thereby guilty of an offence against the Wireless Telegraphy Act, 1949.

[20] See now the Telephone Regulations, 1951 (S.I. 1951, No. 2075), reg. 51. In view of the terms of s. 20 of the Telegraph Act, 1868, it seems safe to assume that none of the few telephone contracts still subsisting would be construed as including a term that debarred the Postmaster-General from intercepting conversations on the lines to which they apply.

[21] *Att-Gen.* v. *Edison Telephone Co. of London* (1880) 6 Q.B.D. 244 (the "*Edison* case" referred to by the Home Secretary: *supra,* p. 503). A telegram gets the worst of both worlds: by virtue of s. 23 of the Telegraph Act, 1869, it is a telegraphic communication for the purposes of the Telegraph Acts; and by virtue of s. 87 (1) of the Post Office Act, 1953, it is a postal packet for the purposes of that Act.

Regulations have been made under this section and the position is therefore that the Post Office official who, acting on the instructions of his superiors, intercepts a private telephone conversation and hands a record of it to a police officer neither commits an offence under the Telegraph Acts nor renders himself liable to any civil proceedings.

It would seem, therefore, that subject to any liability, whether civil or criminal,[22] that might arise out of the publication of the transcript[23] (to which neither the Prerogative nor the authority of his superiors could, of course, afford any defence to the individual official) the interception of telephone conversations is lawful. A man has, that is to say, no legally enforceable right to the privacy of his conversation and it follows—in the circumstances, rather ironically—that there is again no room for the exercise of the Prerogative. One is driven, indeed, to the even more ironical conclusion that, if the law recognised a right to privacy, it would probably recognise also a prerogative right to interfere with it for security or police purposes.

It has been made clear that, in authorising the interception of telephone conversations, the Postmaster-General has in practice acted only on the authority of a warrant addressed to him by the Secretary of State.[24] Since the official interception of telephone conversations is, as has been shown, lawful (except, of course, where the individual official acts contrary to his duty) the warrant would appear to have no effect in law; the practice is, that is to say, an administrative arrangement taking place behind what has been called the departmental screen, adopted presumably by analogy with the statutory provisions governing the interception of postal packets and justified on the ground that, the Secretary of State being the Minister responsible for security and police matters, it provides a safeguard against the abuse—or excessive use—of the Postmaster-General's power. The Postmaster-General remains nevertheless the Minister responsible to Parliament for its exercise.

The legal basis of the practice of interceptions is therefore firm enough. The lawyer will want to know, however, what safeguards there are against its abuse, particularly since the power is, as the then Home Secretary (Sir William Harcourt) pointed out in a debate in 1882, " given for the purposes of State, and the very essence of the power is that no account can be rendered." [25] The answer was provided in the same speech—

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[22] Apart, of course, from any liability under s. 20 of the Telegraph Act, 1868.

[23] As distinct from liability arising out of the interception of the conversation.

[24] See the Home Secretary's statement on June 27.

[25] 267 H.C. Deb. (3rd ser.) 294.

> "There is no security whatever in the exercise of that power except the responsibility of the Minister to whom the power is intrusted, and if he is not fit to exercise the power upon the responsibility which is cast upon him he is not fit to occupy the position of Secretary of State."[26]

Public opinion will probably regard the disclosure of the transcripts in this instance as having been an abuse of the power; it was certainly unprecedented. In the ordinary course of events, however, the interception of telephone conversations would appear to be comparable to the receipt of information from police informers: that is to say, the police act on the information without disclosing its source[27] and it seems not unreasonable to suppose that, on that basis, provided the power is only infrequently exercised, then in the words of the Committee of the House of Commons which reported in 1844, "its exercise would be sanctioned by an enlightened public opinion, and would appear to be strongly called for by important public interests."

It remains only[28] to refer, by way of postscript, to the suggestion that the interception of a telephone conversation between a barrister and his instructing solicitor infringes the rule of professional privilege. The suggestion, it may safely be said, served only to confuse issues which were in themselves complex and difficult enough. Professional privilege is the name commonly given to the rule of evidence which debars a legal adviser from giving, without the consent of his lay client, evidence of any confidential information given to him in the scope of his profession by or on behalf of the client.[29] It is, obviously, not a breach of this privilege for a third person to overhear the giving of the confidence; nor can it be a breach for him to give evidence of what he overheard. The privilege does not, in any event, attach to everything said by the client: it protects only information which is given—and necessarily given—in confidence[30]; it does not apply to information given for a criminal or fraudulent purpose[31]; and, finally, it belongs, not to the legal adviser, but to his client.[32]

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[26] 267 H.C. Deb. (3rd ser.) 295. The matter was raised in Parliament as a result of the interception of letters passing to and from Ireland.

[27] Instances of the production of intercepted letters in evidence are extremely rare, except of course in those cases (such as the posting of an obscene libel) where the letter itself forms, as it were, an ingredient of the offence. An intercepted letter was produced at the trial of Horne Tooke in 1795, 25 Howell's St.Tr. 249. Its admissibility was unsuccessfully challenged. It is now well established that the admissibility of evidence is not affected by the legality of the means used in obtaining it: *Kuruma* v. *The Queen* [1955] A.C. 197.

[28] The part played by the Bar Council, which has been the subject of some criticism, is thought to be a matter for the profession which it was elected to represent.

[29] *R.* v. *Cox and Railton* (1884) 14 Q.B.D. 153.

Causation in Homicide

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-Law*

(continued from p. 440)

Wounds becoming fatal through improper treatment

We can now return to the subject of bad medical treatment with which we started. The problem may be presented in a variety of forms. The conduct of the accused may have been either an act or an omission, either intentional or negligent, and he may have inflicted what was at the outset either a slight injury or a grave one. The improper treatment may have been the fault either of the deceased or of his medical attendants, and may have taken the form either of a negligent omission to cure or of a negligent aggravation of the condition. Moreover the negligence involved in the improper treatment may have been either slight or gross.

In early times, when wounds often did prove fatal, and medical treatment was unreliable, it was understandable that failures of treatment should have been regarded as part of the natural order of things, and so as not displacing criminal responsibility. In one of the earliest reported cases on the subject, *Rew* (1662) Kelyng, J. 26, a statement merely of factual causation was regarded as sufficient to dispose of the subject. " If one gives wounds to another, who neglects the cure of them, or is disorderly, and doth not keep that rule which a wounded person should do; yet if he die it is murder or manslaughter, according as the case was in the person who gave the wounds, because if the wounds had not been, the man had not died." *Cf. Reading* (1661) 1 Keb. 17. Hale, however, made a more sophisticated attempt to deal with the situation in a passage which is worth reproducing in full.

" If a man gives another a stroke, which, it may be, is not in itself so mortal, but that with good care he might be cured, yet if he dies of this wound within the year and a day, it is homicide [*i.e.*, manslaughter] or murder, as the case is, and so it hath been always ruled. But if the wound or hurt be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicine the party dies, if it can already appear that this medicine, and not the wound, was the cause of his death, it seems it is not homicide, but then that must appear clearly and certainly to be so. But if a man receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter, in him that gave the stroke or wound, for that wound, though it were not the immediate cause of his death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently a *causa causati*" (Hale, P.C. 428).

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[30] *Studdy* v. *Saunders* (1823) 2 Dow. & Ry. 347.

[31] *R.* v. *Cox and Railton*, *supra*: the information would not in those circumstances be given to the legal adviser in the scope of his profession.

[32] This passage is intended as a short statement of the law relating to professional privilege. It does not refer to any conversations intercepted on the authority of the warrant which inspired this article.

This passage states that the situation is always one of homicide with one doubtful and grudging exception where the wound is not in itself mortal and the death is brought about not by the wound but by medical maltreatment. (Hale states on this last point that "it must appear clearly and certainly to be so"; but in modern times the burden of proof on an issue of this sort would be, if anywhere, on the Crown.) If the exception be conceded, the gist of Hale's remarks may be stated as a distinction between maltreatment and omission to cure. Maltreatment makes the resulting death too remote, but a mere failure to cure, even though negligent, and even though complications set in, does not. This distinction was adopted by the Criminal Law Commissioners in their Fourth Report (1839): "It is homicide, although if timely remedies or skilful treatment had been applied, death might have been prevented. It is not homicide in the person doing an injury where death results not from the injury done, but from unskilful treatment, or other cause subsequent to the injury." Shee J. also read out Hale to the jury in *Lockley* (1864) 4 F. & F. 155. But opinion upon the rule was by no means unanimous in the nineteenth century. There were three English cases in which its application to manslaughter was considered. In *Clark* (1842) 6 J.P. 508, D gave P many severe blows. A surgeon was called in, who, finding that P was exhibiting symptoms of delirium tremens, bled him; shortly afterwards P died. There was medical evidence that it was dangerous and improper to bleed a patient suffering from delirium tremens. Wightman J. told the jury that if they were of opinion that the deceased did not die of the wounds he had received, but of the bad medical treatment, D would not be guilty even of manslaughter, but only of assault. This ruling accorded with Hale's view; if one assumes that the blows were not mortal hurt within his rule.

In *McIntyre* (1847) 2 Cox 379, D's wife died in the following circumstances. D kicked her and injured her severely; a surgeon being called in gave her brandy to restore her. It appeared that some of the brandy might have gone the wrong way into the lungs, and that this might have caused the death. Coleridge J. directed the jury as follows. "If a person had received a very small wound, and the surgeon administered a poisonous salve, it could not be said that the party giving the wound occasioned the death by the wound or by the salve. That is very unlike the case where a person has received a mortal wound, and dies in consequence of his constitution, or from being very drunk, or from not having medical advice, or from having been injudiciously treated. There the party who gave the mortal wound is the cause of death, though it comes on sooner than it otherwise would." Here, he said, the blow was the cause of death because if the woman had been well she could have rejected the brandy. But the question the judge left to the jury was: "Are you of opinion that she received mortal injuries before the surgeon was called in? If you are of opinion there was no mortal injury before, then you will find the prisoner guilty of an assault only." It will be seen that this opinion, too, accepts Hale's view, with the qualification expressed by Hale himself that it applies only to non-mortal wounds.

The third case indicates a departure of opinion. This was *Davis* (1883) 15 Cox 174. D broke P's jaw in two places; an operation was performed to wire the jaw, and the patient died under the anaesthetic. Mathew J., after consulting Field J., announced that since the chloroform was properly administered, the fact that the death resulted from its use could not affect the criminal responsibility of the accused, who would on these facts be guilty of manslaughter. This ruling was confined to the case where the treatment was proper. In his subsequent direction to the jury, however, the learned judge went further, and held that the defendant was guilty of manslaughter even though the treatment was in some way improper. The death could be traced to the blow if the victim "took the proper course of consulting competent medical men"; no issue could be raised that the death was due to want of skill on the part of the medical men. The court does not seem to have been referred to the earlier authorities on the subject.

Since the recent decision of the Court of Criminal Appeal in *Jordan*, with which we began, it must be taken that Mathew J.'s ruling was wrong, and that the jury should have been directed to consider the possibility of negligence on the part of the surgeon. *Jordan* shows that this is so even where the injury inflicted by the accused was so serious that it would have resulted in death if not attended to. Even though the accused has subjected the deceased to drastic medical measures if his life is to be saved, still if those measures are negligent a death caused by the negligence cannot be attributed to the wound which necessitated the treatment. *A fortiori* is this so where the wound was not itself a serious one.

It may perhaps still be argued that *Jordan* applies only where the medical treatment is grossly negligent, not where it is merely of the degree of negligence recognised in the civil courts. But on the whole it is submitted that the clear and simple rule is that any positive act of negligence on the part of the deceased's medical advisers, bringing about a death which would not have occurred with careful treatment, excludes a charge of manslaughter against the person who gave the wound. There is no social necessity for bringing a charge of manslaughter in such a case, because the law relating to wounding is adequate to deal with it. It may be unfortunate if the conduct of medical men has to be decided as incidental to a criminal charge of manslaughter, and the rule certainly gives scope to the defence to raise unexpected issues. The medical practitioner will dislike having his conduct brought into the limelight in this way, and he is subject to the risk of having his reputation unfairly damaged, for the jury, in their anxiety to acquit the defendant, may accept aspersions upon the deceased's doctors for which there is in truth no warrant. On the other hand, to exclude such evidence, as Mathew J. wished to do, would inevitably create a sense of injustice in the convicted person.

All the cases discussed in this article have been criminal cases, and it is submitted that no useful purpose would be served by going into the civil authorities on these questions. Quite different considerations apply in the two branches of the law. If a civil action were brought on the facts of *Jordan's* case, it would be reasonable to regard the death as a consequence of the injury. But whether this actually represents the civil law is by no means certain. In *Hogan* v. *Bentinck West Harley Collieries* (*Owners*), *Ltd.* [1949] 1 All E.R. 588, the House of Lords studiously refused to decide whether an ill-advised medical operation rendered a resulting injury too remote a consequence of a previous accident for the purpose of the law of workmen's compensation, saying that the question of causation was entirely one of fact for the arbitrator. This mode of statement obscures the truth that the question relates not to factual causation but to legal causation, and is in that sense a question of law. It would be a pity if a similar uncertainty were to invade the criminal law, and for this reason the hope may be expressed that the decision in *Jordan* will be taken as settling the legal principle.

Wounds becoming fatal through neglect of treatment

Hale's opinion was that neglect to heal a wound did not make a resulting death too remote a consequence of the wound, and that the person who gave the wound would be guilty of murder or manslaughter when the death occurred (*ante*, p. 510). This opinion was repeated by authorities of the nineteenth century, but it may be most seriously doubted whether it would be accepted at the present day. Medical treatment is now so regular and reliable an affair that a person who refused it would be acting completely outside the accepted course of conduct. It could hardly be tolerated that the victim of a petty wound could make his assailant guilty of manslaughter by stubbornly refusing all treatment and so bringing about his own death. Even in the civil law, the unreasonable refusal of medical treatment (including a surgical operation) is regarded as making a consequential harm too remote (see *Steele* v. *Robert George & Co.* (*1937*), *Ltd.* [1942] A.C. 497). If this is so in the civil law, it surely must be so with much stronger reason in the criminal law.

Opinions may differ where the deceased was guilty of some carelessness but did not positively refuse to accept medical advice. The old law to the effect that the death was not too remote was followed by the Irish Court for Crown Cases Reserved in *Flynn* (1868) 16 W.R. 319. D struck P on the forehead with a stone; P, instead of resting after his injury, walked and rode several miles, after which he died. The medical evidence was that if P had not exerted himself he would have stood a better chance of recovery. It was held that D was nevertheless guilty of manslaughter. The judgment, after quoting from *Rew* (*ante*, p. 510), and the passage in Hale, draws a distinction between ordinary and extraordinary conduct on the part of the deceased. "These authorities seem to lay down the rule to this effect, that if a man who has received a serious blow or hurt does not alter his ways on that account, but continues to go through the ordinary course of life which he has been accustomed to pursue, that shall not exonerate the giver of the blow from his liability if such conduct has had the effect of causing death. But if, on the other hand, his acts subsequent to the blow have been so far out of the ordinary course as to give rise to a distinct set of circumstances causing a new mischief, there the new mischief will be regarded as the *causa causati,* and not the original blow."

Medical malpractice in the law of murder

Nineteenth century authorities took a stringent view of causation in connection with murder. If the accused inflicted serious injury, or an injury in the course of a felony, and death followed (even though as a result of negligence in attention), the case was regarded as falling within the law of murder. All students of the criminal law know the three cases on this subject of *Wall*, *Holland* and *Pym*, though whether they are now capable of indicating the correct solution may be questioned.

In the first case ((1802) 28 St.Tr. 51), Governor Wall was convicted of the murder of another by sentencing him to an illegal flogging of 800 lashes, though it was argued that death would not have been caused had not the victim drunk spirits while he was ill. The defence would seem to have had little merits on the evidence, because the victim appeared to be in a dying state from the time he entered hospital after the flogging (p. 158). But in any case Macdonald L.C.B. directed the jury that " there is no apology for a man if he puts another in so dangerous and so hazardous a situation by his treatment of him, that some degree of unskilfulness and mistaken treatment of himself may possibly accelerate the fatal catastrophe " (p. 145). It will be observed from this mode of statement that the judge assumed that the flogging in itself brought about the death, and that the drinking of the spirits merely accelerated it. He also assumed that the mistake in treatment was comparatively venial. The spirits consumed by the deceased were the ordinary army ration which were placed by his bedside each day, apparently as a regular hospital routine. When the deceased drank the spirits he was probably in no condition to exercise a proper judgment. These considerations make the case a somewhat special one, to be used with caution in stating the law.

The next case, *Holland* (1841) 2 M. & R. 351, bears upon an omission by the deceased to cure himself as relevant to a charge of murder. The accused waylaid and assaulted the deceased—the report says no more than this, but it may be surmised that the accused was bent upon felonious robbery. The deceased received wounds, including a severe cut across one of the fingers with an iron instrument. His surgeon urged him to submit to amputation, telling him that otherwise his life would be in great hazard; but he refused to allow the amputation. Lockjaw came on, and ultimately caused death. Maule J. directed the jury that on a charge of murder " it made no difference whether the wound was instantly mortal in its own nature, or became the cause of death only by reason of the deceased's not having adopted the best mode of treatment." In the year 1841 it was perhaps not unreasonable for a man to refuse himself to the hazard of a surgical operation. The same can hardly be true at the present day. The argument here is precisely the same as where the charge is of manslaughter, and is indeed *a fortiori*: if the death would not have occurred apart from the unreasonable refusal of the deceased to submit to an operation, murder should be out of the question, at any rate where the accused did not intend to kill. The particular question in *Holland* can no longer arise in connection with the felony-murder rule, owing to the abolition of that rule, though it is still important if the charge is of murder on account of the infliction of serious harm.

In the third case, *Pym* (1846) 1 Cox 339, the facts given in evidence were that a wound was inflicted in a duel, which meant that the person inflicting it would have been guilty of murder if death had ensued directly. Erle J., with the concurrence of Rolfe B., expressed the opinion that the accused was equally guilty of murder if the death ensued from an operation thought necessary and performed by competent medical advisers, who considered that the wound was dangerous. Therefore, evidence was not admissible to show that the medical men were wrong in their opinion that the operation was necessary; and that the deceased might have lived had it not been performed. Upon this the comment may be made that the decision does not on its literal wording go very far. Apparently the defence sought only to show that the operation was (as the event proved) a mistake—which is not the point now under discussion. To advise an operation is not negligent merely because the advice turns out to have been mistaken, provided that it appeared reasonable at the time when it was given.

However, the judge probably intended to rule that even an allegation of negligence against the doctors is not allowed to be supported by evidence. It is submitted that such a rule cannot be accepted as part of modern law. A duellist does not necessarily desire the death of his adversary, and his guilt of murder if he kills rests upon the constructive form of malice aforethought, namely, killing as the result of the intentional infliction of serious harm. This constructive form of malice aforethought should be subject to the same rules in respect of causation as manslaughter, for there can be no justification for treating an unintended death as murder when it could not even be manslaughter. It is submitted, therefore, that the doctrine of *Jordan* (*ante*, p. 512) applies to constructive murder.

Each of the three cases just considered turns on the law of constructive murder, for in none of them did the accused positively intend to kill. The question of remoteness of consequence where there is such an intent to kill will be considered presently.

Proper medical treatment does not make a consequence too remote

That a death is not too remote a consequence of an injury where it results from proper medical treatment, even though the treatment appears afterwards to have been mistaken, is implicit in several of the authorities already considered, such as *Davis* (*ante*, p. 512) and *Pym*. It is possible that in some circumstances a more lenient view would now be taken, but not if the proper medical treatment merely accelerated death in a hopeless case. In *Wileman* (1938) 2 J.Crim.L. 531, D knocked P down; in falling P suffered severe head injuries from which he became unconscious. An operation was performed in an effort to save his life, but by a rare mischance which no skill could have prevented the operation brought about his death. A post-mortem showed that the head injuries were so severe that P could not in any event have lived for much longer, and the mishap only accelerated his death by a very short time. Goddard J., as he then was, directed the jury that a blow struck in these circumstances was in law the cause of the death.

Where a wound results in sepsis, without the fault of anyone, and this in turn brings about death, the death is clearly not too remote a consequence of the wound (*Brintons, Ltd*. v. *Turvey* [1905] A.C. 230 at 233–234, *per* Lord Halsbury L.C.). But a wholly extraneous factor occurring during treatment may be held to make the death too remote, even though there is no negligence in the treatment, and even though the weakened state of the deceased in consequence of the wound may have played some small part in bringing about his death. Thus it was held in Kentucky that it was not homicide when the deceased woman received a wound not necessarily mortal, and in consequence was taken to hospital, where she took scarlet fever from a nurse and died of the fever (*Bush* v. *Commonwealth* (1880) 78 Ky. 268). Even a pre-existing disease may be held to be the substantial cause of the death, at any rate to the extent of preventing conviction for murder. In *Macdonald* (1844) 8 J.P. 138, proper medical treatment was given to a person who had been wounded by a shot; he did not die directly from the wound, but his death from tuberculosis was probably accelerated by the fact that he had to be confined to bed and operated upon for the removal of the shot. The shooter was acquitted of murder. A similar problem came before a Virginia court, and was settled in the same way, the reason given being that D's act did not contribute to the death in a sufficiently substantial way (see 31 *Michigan Law Review* 667). If the law of constructive manslaughter were abolished the problem would hardly arise.

An illustration of the difficulty that may be experienced in deciding whether an extraneous factor is involved is provided by

Wrigley (1829) 1 Lew. 171. D deliberately struck P's head against the ground; P was laid out on a form, from which he fell to the ground and died. It was uncertain whether his death was due to the original striking of his head or to the fall. Bayley J. doubted whether this was evidence to go to the jury on a charge of manslaughter, evidently thinking that if the death had occurred from the fall, it could not be attributed to the battery, even though P would not have been placed on the form but for the fact that he had been injured. The learned judge left the case to the jury intimating that if they convicted he would reserve a case; but they acquitted. In a situation of this type, the prosecution may well be in a logical dilemma. If it was improper for those rendering first aid to the deceased to lay him on a form, then the case falls within the rule in *Jordan*, relating to negligent medical treatment. If it was proper to lay him on the form, because no particular danger was involved in doing so, then the death (assuming that it occurred through falling off the form) could not be attributed to any dangerous condition created by the accused. It is true that the deceased would never have been lying on the form if he had not been injured, but this type of connection between the defendant's act and the death is too remote in law. It is like the case where a person is slightly injured by A, and is then knocked down by B when he is on his way to hospital to seek treatment for the first injury. The second injury does not follow from any dangerous condition created by the first injury.

Can intended consequences be too remote?

It is sometimes stated as a proposition of law that an intended consequence can never be too remote. Certainly this is often true. If a man intends a consequence to follow from his act, however wildly improbable it may initially be that it should follow, and however protracted the chain of causation, the consequence if it does occur should not generally be too remote. There is authority for saying that where a consequence is intended, the mere fact that it happens in a somewhat unexpected way is immaterial: *Michael* (1840) 2 Moody 120. An illustration given by the Criminal Law Commissioners was as follows: D, intending to cut P's throat, throws him down, and so doing happens to effect by the fall that which he intended to accomplish by the knife. The act is murder. (Fourth Report (1839), Parl.Pap. xix 254.) On the other hand, if a totally new and unexpected cause supervenes, the consequence may be held to be too remote. Thus: D attacks P, and leaves him for dead, but he is not dead and is only afterwards killed by (i) E, a new enemy, seizing the opportunity of killing him in his weak and defenceless state, or by (ii) an earthquake bringing down the building in which he is lying. In each case there is a causal connection between D's act and the death, for but for D's act P would not have been lying in the building at the time when he meets his end. But the cause is probably too remote in law, for P's death is caused by an entirely new hazard.[2] If the supervening cause was to be expected, it may be regarded as a mere difference of mode. Thus if D had attacked P on the seashore and left him for dead, and P had been drowned by the incoming tide, it would probably be murder.[3]

The facts of an Illinois case serve as another illustration of the general problem. D threw a heavy glass tumbler at his wife, P; the glass hit a lamp she was carrying, spilt the oil, and caused it to take fire and burn her to death. Since D was taken to have intended to do great bodily harm he was held guilty of murder (*Mayes* v. *People* (1883) 106 Ill. 306). This ruling is probably too strict for present opinion, having regard to the fact that D did not intend to kill. If, however, D in such circumstances really intended to kill, it is quite likely that even at the present day he would be held guilty of murder. Similarly, the Indian Code Commissioners expressed the opinion that if an assailant means to kill but his knife glances aside and only scratches the victim, still if the victim unavoidably contracts tetanus from the wound and dies, the assailant will be guilty of intentional homicide.[4]

Sometimes the defendant may have intended the precise consequence that followed, and yet one has difficulty in saying that the consequence is sufficiently proximate in law to make the defendant guilty. A moot case much discussed in academic circles is that of the defendant who advises another to take a post in a fever-infested region, hoping that this will be the end of him, as it proves to be. It can be argued that this is murder, because (i) a man can "kill" by giving advice, as when he advises another in a fog to take a path which, as he knows, leads to the cliff edge; (ii) the consent and contributory negligence of the victim are no defence; and (iii) no consequence which is precisely intended can be too remote. But the problem raises doubt whether rule (iii) is not too widely stated. It will perhaps be a pity if the problem is ever settled, because it does no one any harm and is a useful intellectual exercise. For the same reason, the question whether King David murdered Uriah, the Hittite, when, in order to get rid of him, he sent him to the forefront of the hottest battle (II Samuel, xi 15) may safely be left to the judgment of law students. Direct infection of another with a fatal disease in order to cause death would doubtless be murder. Hale doubted this, saying that "infection is God's arrow" (P.C. 1 432), but it is unlikely that his view would now be taken.

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[2] *Cf.* the American cases cited by Perkins in (1946) 36 *Journal of Criminal Law and Criminology* 393.

[3] *Perkins*, *op. cit.*, at 394.

[4] Macauley, *Works*, ed. Lady Trevelyan 1866, Notes on the Indian Penal Code, VII 499.

The general opinion is that murder cannot be committed by perjury, even though the perjury causes a person to be unjustly executed.[5] But the case cited—*McDaniel* (1756) 1 Leach 44, is not absolutely conclusive, because the prosecution was abandoned by the Attorney-General. The Commissioners of 1845 in their Second Report, 1846 (Parl.Pap. xxiv 131), supported the opinion that the act ought not to be murder, partly from the fear that otherwise witnesses would not come forward on a trial for a capital offence. The fear seems to be a fanciful one. Perhaps the idea that really underlies the rule, if it really exists, is that the defendant has not killed by his own act but has merely set judicial machinery in motion or perverted its course; the intervention of the judicial discretion prevents the consequence being directly attributable to him. This idea is a familiar one in law, whether it be strictly rational or not.

Contributory negligence in criminal law

There is a considerable body of authority for the proposition that contributory negligence is no defence in criminal law. This does not mean that the negligence of the deceased is of no legal account; it merely means that that negligence is to be judged on the same principles as negligence by a third person. The question in all homicide cases is whether the death was factually and legally connected with the wrong by the accused.

A good illustration of the exclusion of the defence of contributory negligence, where the consequence was not too remote, is *Longbottom* (1849) 3 Cox 439. P, a deaf person, was walking in the middle of the highway, and was run over from behind by D, who was driving too fast. It was ruled that D could be convicted of manslaughter notwithstanding any contributory negligence there might have been on the part of P in walking in the road. But Rolfe B. said: "It may be that he ought not to be severely punished."

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[5] For the history of the rule see Criminal Law Commissioners, Fourth Report (1839), Parl.Pap. xix 268; Russell, *Crimes*, 10th ed. 482; Radzinowicz, *History of English Criminal Law*, ii 327 *et seq.*

Conviction of a lesser offence

The increasing readiness of the courts to hold a death to be too remote a consequence of the defendant's act makes it of great importance that he should be open to conviction for the lesser offence of which he has been guilty. The general practice of not joining lesser charges to an indictment for murder or manslaughter (*Large* (1939) 27 Cr.App.R. 65; [1957] Crim.L.R. 214) makes this somewhat difficult. It means that if a defendant is acquitted of murder or manslaughter on facts like *Jordan*, he cannot be convicted of any crime unless he is re-indicted. One may doubt whether this rule is in the interests of justice.

"Diminished Responsibility" and the Trial of Lunatics Act, 1883

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In a recent article in the *Criminal Law Review* [1] on the Homicide Act, 1957, Mr. D. W. Elliott examined section 2 of the Act (which reduces murder to manslaughter on proof by the defence that the accused "was suffering from such abnormality of mind . . . as substantially impaired his mental responsibility"). Mr. Elliott says of this section [2]:

> "It cannot be doubted that such persons [that is, persons who *are* within the McNaghten Rules] are suffering from such abnormality of the mind as substantially to impair their mental responsibility. The Act does not abolish the defence of insanity, but it is difficult to see why any prisoner should ever plead it and risk lifelong detention as a Broadmoor patient. Indeed the Attorney-General admitted in the Commons that this section will virtually end the relevance of the McNaghten Rules, so that all prisoners, affected by any substantial degree of mental abnormality, will be entitled to be treated alike."

They will be treated alike, Mr. Elliott explains, by being all convicted of manslaughter and "so treated like mentally normal prisoners."

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[1] [1957] Crim.L.R. 282.
[2] At p. 284.

This is surely a misleading account of the Attorney-General's view. What the Attorney-General said on this point in the Commons was[3]:

> "I think that the strict answer to that [*i.e.*, the question whether the introduction of this new doctrine would mean the end of the McNaghten Rules] is that it will not, but I do not suppose that many accused persons will put forward a defence of insanity. I should perhaps make this clear. If the defence raises any question as to the accused's mental capacity, and evidence is called to show that he is suffering from a serious abnormality of mind, then, if the evidence goes beyond a diminution of responsibility and really shows that the accused was insane within the McNaghten Rules, it would be right for the judge to leave it to the jury to determine whether the accused was, to use the old phrase, 'guilty but insane' or to return a verdict of manslaughter on the basis that, although not insane, he suffered from diminished responsibility."

Both Mr. Elliott and the Attorney-General in these passages contemplate what may be called the "overlap" case: that is to say, the case of the person accused of murder who could prove either that he was insane within the meaning of the McNaghten Rules at the time of committing the act, or that he suffered from diminished responsibility within the meaning of the new section, and who may therefore be expected to choose between the two defences. If he were to establish insanity he would secure a special verdict of "guilty but insane"; if diminished responsibility he would be entitled to a verdict of manslaughter. The Attorney-General and Mr. Elliott predict that he will normally prefer the latter result.

The purpose of this article is to investigate the meaning and correctness of the Attorney-General's suggestion as to the judge's direction to the jury in such a case. Is there any substance in Mr. Elliott's criticism that persons within the McNaghten Rules will now be treated "like mentally normal prisoners"? Or will this be avoided by the proper application of some existing rule of law or procedure?

It may be objected that the problem is illusory. It may be said that persons who could prove both diminished responsibility and insanity will in most cases be certifiable; that if so, when charged with murder and convicted of manslaughter, they will in practice be certified at once and become Broadmoor patients under the provisions of the Criminal Lunatics Act, 1884; and that there will, therefore, be no substantial period during which a person who ought to be a Broadmoor patient will not in fact be one. But, first, even if the premise is true, there must remain the possibility that in some cases the conclusion will not follow because of a failure to certify. Secondly, it would be inelegant and inconvenient if classification as a Broadmoor patient were to depend upon such an indirect and clumsy process. Thirdly, it would be unfortunate if an accused were to be advised that he might in effect submit to a conviction of manslaughter so as to avoid detention as a Broadmoor patient, and, having seen this advice apparently vindicated by verdict and sentence, were then to be at once certified and condemned to a fate that he had been told he was avoiding. Fourthly, after a conviction under section 2, the judge will have a complete discretion as to sentence, and in some cases may not impose a term of imprisonment.

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[3] H.C. Debates, Vol. 560, col. 1254.

The special verdict

It is submitted for these reasons that the problem is not illusory. It may also be said at once that the problem of the correct verdict in the overlap case appears to be one of some difficulty. There is reason to regret that the Attorney-General did not make himself clearer on the point, and that the procedural implications of section 2 were not more fully considered in the substantial debate in the Commons on the Second Reading. According to the Attorney-General, in a case appearing on the evidence to be an overlap case it would be " right for the judge " to leave a choice of verdicts to the jury. It is a pity that he did not explain to the House the source of the judge's power or duty to do what he somewhat non-committally described as " right " to do. Most members will have been familiar with the verdict of " guilty but insane " only as it results from the raising of the issue of insanity as a particular defence. They will, therefore, have been surprised to hear that the judge may make the special verdict available to the jury otherwise than where insanity is relied upon as such by the defence. The present problem is whether, indeed, in the new situation produced by section 2 the judge has such a power.

The special verdict is, of course, a verdict under the Trial of Lunatics Act, 1883, which by section 2 (1) provides:

> " Where in any indictment or information any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or the omission

> made, then, if it appears to the jury before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission."

When such a verdict is returned, the accused is ordered to be detained as a Broadmoor patient pending Her Majesty's pleasure. The verdict is one of acquittal, and there can be no appeal either from the finding that the accused was " guilty of the act or omission charged," or from the finding that he was insane.[4] The verdict, indeed, is misleading in its wording and has often been criticised on this ground [5]; its true effect is that the accused was not guilty on the ground of insanity. It " is not a verdict that the accused was guilty of the offence charged, but that he was guilty of the act charged as an offence." [6]

Until recently one could reduce to the simplest terms the situation in which the special verdict was thought of as being appropriate. That was the situation in which the defence led evidence of insanity for the very purpose of proving, and in fact proved, that the accused was insane within the McNaghten Rules and so not criminally responsible. Insanity being an issue for the defence to raise, evidence as to the condition of the accused's mind is not to be called as part of the prosecution case.[7] Nor is it proper for the judge to take it upon himself to call evidence of insanity, in particular because such evidence may prejudice some other defence upon which the accused is relying—provocation, self-defence, and so on, or even that he did not do the act.[8] In *R.* v. *Hill* [9] (a case of wounding with intent to cause grievous bodily harm) the Recorder called evidence of insanity against the prisoner's will. He left the issue of insanity to the jury, but failed to leave to them the defence of self-defence which the prisoner had sought to raise. The jury returned a special verdict, and the Court of Criminal Appeal quashed the " conviction," it being thought at this time that there could be an appeal against so much of the verdict of "guilty but insane" as finds the accused "guilty of the act or omission charged."[10] Since *Felstead* v. *R.*[11] no appeal would be possible in a case like *R.* v. *Hill*. The modern view has been that the judge has no power to take the course adopted by the recorder in that case.[12]

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[4] *Felstead* v. *R.* [1914] A.C. 534.

[5] See, *e.g.*, *Report of Royal Commission on Capital Punishment*, 1953, Cmd. 8932, paras. 458–459.

[6] [1914] A.C. 534, 542, *per* Lord Reading C.J.

[7] *R.* v. *Smith* (1912) 8 Cr.App.R. 72. See also *R.* v. *Smith* (1910) 6 Cr.App. R. 19; *R.* v. *Casey* (1947) 32 Cr.App.R. 91.

[8] Royal Commission's Report, para. 448.

[9] (1911) 7 Cr.App.R. 26.

The wording of the simple principle that insanity is an *issue* to be raised by the defence[13] is satisfactory so long as the existence of insanity as a state of fact is inconsistent or potentially inconsistent with other defences. To raise the issue of insanity certainly may reduce the force, as factual material for the jury's consideration, of evidence of, for example, self-defence. But there may, to argue hypothetically for the present, be other defences which are not factually inconsistent with the existence of insanity; defences, that is to say, capable of being convincingly established by facts which admit of the interpretation "insanity *also*." If such defences exist, and if it is right that the principle that insanity is an issue to be raised by the defence alone is to be attributed largely to the fact that there may be another defence in some degree reduced in force by evidence of insanity, then it becomes apparent that the principle is perhaps not, for all purposes, correctly worded. It may be that one should abandon the wording while retaining the substance, and merely say: Evidence of insanity may be led only by the defence in the first instance. Even if there is no single reason why the principle has hitherto existed, so expressed it suffices for every situation met with, so far as I know, until 1956.

Consistently with the principle thus expressed, Devlin J. in *R.* v. *Kemp*[14] in 1956 raised the issue of insanity himself or allowed the prosecution to do so. That is to say, he allowed the jury to consider whether the accused was insane at the time of committing the act charged (indeed, he directed them to find insanity), even though the defence desired that such a question should not be considered. The accused was charged with causing grievous bodily harm to his wife. He had struck her with a hammer during a lapse of consciousness caused by arterio-sclerosis, and was on any view entitled to an acquittal: he " was not responsible for his acts and did not know what he was doing and therefore could not have the necessary guilty intent."[15] But it was argued for the Crown and accepted by Devlin J. that the state of mind revealed by the medical evidence called for the defence, though relied on by the defence to secure a simple acquittal, was in fact a state of insanity within the McNaghten Rules. It was therefore held that there should be a special verdict under the Trial of Lunatics Act, described by Devlin J. as " a qualified form of acquittal."[16] The defence that the accused had no *mens rea* because he did not know what he was doing need not always involve proof of insanity: it presumably would not do so in the case of an assault committed by a sleep-walker. In *R.* v. *Kemp*, however, it did. The procedure in the case may be expressed in the form: the defence led evidence of insanity, and the judge (or the prosecution) raised insanity as an issue. To refer to the material words of section 2 (1) of the 1883 Act, Devlin J. regarded an occasion for leaving the issue of insanity to the jury as arising when evidence was given " on the trial of such person . . . that he was insane, so as not to be responsible, according to law, for his actions at the time when he did the act." He treated the phrase " insane, so as not to be responsible, according to law " as meaning insane within the meaning of the McNaghten Rules; for " the tests of responsibility according to law that have been laid down are those laid down in the McNaghten Rules."[17] The occasion arising, and the issue being accordingly raised, " then, if it appears to the jury . . . that he did the act . . . , but was insane as aforesaid . . . , the jury shall return a special verdict. . . ." In *R.* v. *Kemp* the jury had no alternative but to return such a verdict; but the statute must be interpreted to mean that the issue may be left to them wherever evidence is before them, having been properly led, on which they *could* find insanity.

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[10] *R.* v. *Machardy* [1911] 2 K.B. 1144.

[11] [1914] A.C. 534.

[12] *Cf.* Glanville Williams, *The Criminal Law*, p. 311, and Royal Commission's Report, para. 443. At the subsequent trial of Hill for assault the Common Sergeant "obviously thought him insane"; but "the prisoner refused to set up the defence" and the Common Sergeant did not raise the issue (although the C.C.A. had not ruled on the earlier appeal that the judge had no power to do so). Hill was convicted of assault, and on his application for leave to appeal the C.C.A. could not interfere: "it is a case for the Home Secretary": 7 Cr.App.R. 83.

[13] The principle is summarised thus, for example, by the Royal Commission's Report, at para. 443: "It has . . . been accepted as the law of England that the issue of insanity at the time of the offence may not be raised by the judge or by the prosecution, but only by the defence."

[14] [1956] 3 W.L.R. 724.

It is respectfully submitted that it was open to Devlin J. to take the course he took, that course being consistent with principle and with the wording of the 1883 Act and not inconsistent with any later authority.

Application of the special verdict to the Homicide Act, 1957

It is probable that this somewhat fortuitous precedent was fresh in the Attorney-General's mind when in the House of Commons he expressed the view that a judge might adopt a similar procedure where the defence is one of " diminished responsibility " under section 2 of the Homicide Act, 1957; for *R. v. Kemp* had been reported less than a month before. If so the concealed analogy was, it may be thought, a correct one. Adopting the methods of analysis suggested above: (i) insanity within the meaning of the McNaghten Rules is so far consistent with diminished responsibility that the suggestion that the former existed could not reduce the force of evidence directed to proof of the latter; and (ii) if the Attorney-General is right, the situation would be that the defence would lead evidence of insanity and the judge would raise insanity as an issue. It is therefore submitted that, in the situation envisaged by the Attorney-General, the judge would have the power to make the special verdict available to the jury. Indeed, it would presumably be his duty to do so. Granted a situation in which the Trial of Lunatics Act is relevant, its language is imperative[18]: " if it appears to the jury . . . that he did the act . . . but was insane . . . , the jury shall return a special verdict. . . ." In the face of that language in section 2 (1) it seems irrelevant that the principal purpose of the subsection was not to enlarge the scope of acquittals on the ground of insanity but to alter the form of verdict on such acquittals. The subsection replaced the provision in the Criminal Lunatics Act, 1800, that " where it shall be given in evidence upon the trial of any person charged with treason, murder, or felony, that such person was insane at the time of the commission of such offence, and such person shall be acquitted, the jury shall be required to find specially whether such person was insane at the time of the commission of such offence, and to declare whether such person was acquitted by them on account of such insanity " (the court, upon such a finding, being required to order such person to be kept in safe custody). The 1883 Act requires a special verdict in a different form. " It made no substantial difference in the administration of the law " apart from that, according to Lord Reading in *Felstead* v. *R.*[19] But it did extend the use of the special verdict to misdemeanours; and in any case it seems difficult to read the word " shall " as being imperative as to the form of verdict and not imperative as to the occasions for its use. Moreover, if the judge were to leave insanity to the jury in one overlap case, the demands of consistency would surely require that he should do so in the next.

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[15] At p. 727. *Cf. R.* v. *Charlson* [1955] 1 W.L.R. 317.

[16] At p. 727.

[17] At p. 728.

In this connection one should logically be able to add that if an acquittal on the ground of insanity is possible on the evidence, the judge should leave the possibility to the jury, just as he is required to leave provocation to them when there is some evidence of it even though self-defence, for example, is alone raised by the defence.[20] But this point cannot be made, for the present discussion derives precisely from the fact that in the contemplated case the accused would rather a conviction of manslaughter than a special verdict acquittal. It is similarly paradoxical that if, as may be, the prosecution would prefer a special verdict to a conviction of manslaughter, they may find themselves in the position of arguing for what is technically an acquittal while the defence argue for a conviction.[21] These paradoxes must be attributed to the decision in *Felstead* v. *R.*[22] that " guilty but insane " is an acquittal, and not to the factual situation.

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[18] As was noted by Darling J. in *R.* v. *Ireland* [1910] 1 K.B. 654, 657.

[19] [1914] A.C. 534, 541.

Very much more serious than either of these oddities is the substantial difficulty that a verdict of " guilty but insane " is not appealable. This difficulty does not detract from the main argument. What section 2 of the recent Act has done is to exempt from convictions of murder persons not entitled at common law to any exemption. The conclusion argued for here is that other persons formerly destined to be Broadmoor patients should remain so destined as the direct result of a verdict available to the jury. It is quite incidental that the non-appealability of that verdict may result in prisoners becoming Broadmoor patients, and remaining so, who should not be so. (In the same way, the procedure and verdict in *R.* v. *Kemp*[23] could recur in a situation similar to that in *R.* v. *Kemp* but which ought to result in an absolute acquittal either on the evidence as to *actus reus* or because of the nature of the medical evidence.) If the main conclusion of this article is correct it is clearly high time that a right of appeal from the special verdict was allowed.[24]

It should be stressed that the discussion has been limited to demonstrating that where evidence led *by the defence* to prove diminished responsibility in fact reveals insanity, a special verdict would be appropriate. The arguments adduced to this end would not, it may be felt, avail in the same way to justify evidence being called by the prosecution or the judge to show that the defence evidence of diminished responsibility reveals only a partial picture of the prisoner's mental condition. It is true that in *R.* v. *Kemp* Devlin J. allowed the prosecution to call evidence that Kemp committed the act as a result of melancholia, and not, as was the defence (and part of the prosecution) evidence, as a result of a congestion of blood in the brain. In allowing this evidence the learned judge may have been going too far.[25] Section 2 of the Homicide Act allows an accused to prove diminished responsibility. It does not require him to *meet* an allegation of insanity. This is not, however, to say that the defence witnesses called to speak as to his mental condition may not be cross-examined with a view to establishing the fuller picture that does not appear in examination-in-chief. It would be odd if the judge (or prosecuting counsel) could not require such witnesses to speak at large on the subject (mental condition) to which their testimony relates and to expand that testimony in the light of the McNaghten Rules. It is merely suggested that there can be no rebuttal, to prove insanity, of the evidence thus comprehensively given for the defence.

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[20] *R.* v. *Hopper* [1915] 2 K.B. 431; *Mancini* v. *D.P.P.* [1942] A.C. 1.

[21] In *R.* v. *Kemp* [1956] 3 W.L.R. 724, each sought a different form of acquittal.

[22] [1914] A.C. 534.

[23] [1956] 3 W.L.R. 724.

[24] *Cf.* Hall Williams in 20 M.L.R. at p. 57, who, it should be said, in his note here on *R.* v. *Kemp*, interprets that case as authority for, *inter alia*, the proposition that " by raising the defence of unconscious conduct the accused may be taken to raise the issue of insanity."

From The West Riding Justices' Accounts 1829-1830

By Ernest W. Pettifer, M.A.

The upheaval in the house due to spring-cleaning brought to light a slim volume with grey cardboard sides and a strip of brown leather strengthening the back. It bears the superscription "An account of the Disbursements of the West Riding of the County of York from the 27th of April, 1829, to the 19th of April, 1830, by William Lee, Esq: Treasurer." Below the badge, which includes the White Rose of Yorkshire, are the words, "Pontefract, John Fox & Son, Market Street," and the date of printing, "MDCCCXXX."

The original owner left his signature, written firmly with a quill pen, across the top of the front cover, "F. L. Wood." Sir Francis Lindley Wood, Bart., of Hickleton Hall, Near Doncaster, was the grandfather of the First Viscount Halifax. He was appointed to the

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[25] In fact Devlin J. held that on either view the act resulted from a "defect of reason, from disease of the mind" within the meaning of the McNaghten Rules, so that the suggestion of melancholia did not affect the result of the case.

Commission of the Peace for the Riding in a momentous year, 1812. By the time the book came into his hands he was an experienced justice of eighteen years' standing and evidently methodical in dealing with county financial matters. He made a careful check of the figures in the new book of accounts ; some of the items are ticked off, and to the summary at the end he added the figures of the previous year by way of comparison.

There is nothing to show how long the book has been on the bookshelf, nor whence it came. In all probability it was cursorily examined at the time, and was relegated to the shelves as of little value. Such was the impression it gave when discovered amongst the piles of books on the floor of the study recently, but a more careful perusal disclosed some entries which aroused curiosity. Some notes were made and from the items noted it seems possible that there can be built-up some information as to the real background of the period during which these financial proceedings of the West Riding justices had their origin, April, 1829–April, 1830.

But, in order not to put the cart before the horse, a brief explanation is necessary as to the contents of the book in general. Put shortly, the accounts cover all expenditure authorised by the quarter sessions. The clerk of the peace, and his deputy, both paid by fees, submitted their accounts at the end of the year, as did the numerous chief constables and other officers of the Riding. Messrs. B. and B. Hartley (father and son) of Pontefract were not only the surveyors of highways and bridges, drawing salaries as such officers, but they also carried out the repairs and rebuildings necessary in respect of the bridges and the county buildings (prisons, asylums, courthouses, etc.). The Hartley account alone amounted to £5,550. Then there were the charges for the maintenance of the House of Correction and York Castle, and the conveyance of prisoners to those establishments, and we find page after page of items submitted by the parish constables for their costs and charges for carrying out their routine parish duties, and, in addition, the costs of conveyance of arrested persons to local lock-ups, and of escorting a very considerable number of paupers through the Riding, and passing them on to other counties.

Quarter sessions expenditure

In the present day the quarter sessions in counties are usually held at one town, but in 1829, to ease the travelling problems of justices, jurors, witnesses and others, they were held in rotation at various towns to ensure that every part of the Riding was visited once each year. Thus, the Spring Sessions were held at Pontefract, while the Midsummer sittings were at Skipton and by adjournment to Bradford and Rotherham. The Michaelmas Sessions commenced at Knaresborough and adjourned to Leeds, and from there to Sheffield. The Christmas order was Wetherby, Leeds, Doncaster.

Normally, this distribution of the work of quarter sessions ensured that the lists were not too long at any one court, and the justices usually assembled to do their business in one courtroom. Running through the accounts for the year under review there is, however, the suggestion that the number of cases at every sessions town was abnormally high. At Sheffield Sessions, October, 1829, for example, some eighty cases were for hearing, involving more than a hundred prisoners. Not only at Sheffield, but at Bradford, Pontefract, Wakefield and Doncaster, in that year, it was found necessary to organise second courts to deal with the work, and to find a clerk for these extra courts. In each case a man named Thomas Pitt was brought in to " record the proceedings," at a fixed fee of three guineas per day. At Sheffield he was required for five days, at Pontefract for six days, and at Bradford, Wakefield and Doncaster, for three days.

Some search as to the identity of Mr. Pitt brought to light the interesting fact that he was the " Chief Constable " for the Huddersfield division, where he carried out, in addition, the duties devolving upon an Inspector of Weights and Measures! Pursuing the investigation further it was discovered that there were nineteen of these " Chief Constables " in the West Riding, and that most of them were evidently regarded by the justices as handy and versatile officials capable of holding other appointments. Some were Inspectors of Weights and Measures, some were Inspectors of Corn Returns, and two at least (Thomas Wilkinson of Pontefract, and William Workman of Doncaster) were Clerks to the Justices of their respective Divisions! Pitt was evidently in favour with the justices, who must have regarded him as suitable to act as clerk in a second court. The fact that on more than one occasion special expenses had to be incurred to prepare a second courtroom also points to the need being unusual (*e.g.*, " to fitting up the 2nd Court at the Town Hall, Doncaster...15s. 2d.").

A man named Thomas Waterworth seems to have held an official appointment as crier and chief usher of the courts, and he engaged a staff for each court (" To keep the peace in Court during Sessions "), and the numbers varied with the lists of cases for hearing. For a lengthy sitting thirty-one or thirty-two might be engaged; for a less busy sitting the number might be thirteen or fourteen. It seems clear that the justices did not look to the parish constables to keep order in their courts, and that they preferred to engage their own staff through the chief usher or crier.

Another point which is illustrated by entries in the treasurer's accounts is that, when the business was prolonged, refreshments were ordered to be supplied for the justices, counsel and the jurors. At Pontefract, for instance, the cost of these refreshments was £53 16s. 6d. With 126 cases in the list at those sessions (April 27, 1829), it is not surprising that the justices had to sit in two courts for six days to get through the business, and that the account for refreshments was a considerable one. At Wetherby (January 12, 1830), with only thirteen cases for trial, the bill for refreshments was the modest one of 18s. At Rotherham a Mrs. Oldfield ran a refreshment stall or counter from which she supplied food and drink. Her charge, paid from county funds, for refreshments supplied to justices, counsel and jurors was £8 7s. during the sittings of three days.

Before leaving the question of costs incurred in preparing for and running the courts, we may just glance at the items covering the cleaning of the courtrooms. At Wakefield a Mrs. Elizabeth Rumford seems to have been permanently employed at a salary of £30 per annum, and the charges for her salary, and for the cost of cleaning materials, appears in the accounts each quarter. At Wakefield, also, there was a half-yearly charge by the " Gas Light Company " for lighting the courthouse with gas. By way of contrast, the courthouse at Skipton was left to the ministrations of the parish constable—" The constable of Skipton, for cleaning the courthouse, and *straw for the prisoners*, £2 2s. 6d." The constable of Wetherby managed to make the same preparations for two shillings less, but, as he had to undertake repairs to the courthouse himself, there was a further charge of £3 1s. 6d.

Vagrancy

For centuries justices of the peace were invested with very wide powers for dealing with the vagrant—the rogue and vagabond or idle and disorderly person mentioned in successive statutes. Whipping, stocks or imprisonment, branding, selling into slavery, and even transportation, these were the punishments provided at various times to deal with the man or woman who, to seek work or to avoid it, to escape apprehension for crimes committed in their own parish, or for other reasons left that parish and took to the highways and byways and lived on the various communities through whose districts they passed. The Vagrancy Act of 1824, still in force, had been passed six years before the justices sat in quarter sessions in 1829–1830 and, with some modifications, it is still the principal statute under which justices today deal with the wandering beggar or the homeless person " sleeping rough " or found on premises under suspicious circumstances. Such offences as fortune-telling, exposing wounds to excite charity, gaming with cards or coins in the open air, suspected thieves frequenting public places, are still dealt with under the old Act of 1824, and the descriptions "idle and disorderly persons," "rogues and vagabonds," and "incorrigible rogues" are still applied to those who commit certain offences.

In the treasurer's accounts there are numerous entries of disbursements for expenses incurred in dealing with the unwanted vagrants apprehended by parish constables and taken before the justices. Some of these entries are distinctly difficult to understand. The Act of 1824 abolished the power to transport vagrants overseas for not exceeding seven years, and substituted imprisonment, yet it is quite clear that some sort of system was in force in the West Riding by which many persons, variously described as "paupers," "vagrants," or simply as "poor" were being dispatched towards the islands of Jersey and Guernsey. Here are some specimen entries: "Constable of Wetherby for conveying vagrants to the isles of Guernsey and Jersey...£7 12s. 5d." Mr. Tymms, the gaoler at Doncaster, incurred costs of £8 1s. for "conveying vagrants to Jersey and Guernsey." On another occasion his costs were £7 12s. 5d. The constable of Wetherby, again, incurred costs amounting to £12 1s. 11d. "for conveying the poor en route to the isles of Guernsey and Jersey."

The entries are clear and unmistakable. An unspecified number of unwanted people were being conducted towards the Channel Islands, and the constables and gaolers in charge of them were acting under some authority. That such authority was given by justices either sitting in quarter sessions or singly in their own homes seems clear, otherwise the treasurer would not have received the order of the sessions, as he did, to defray the costs. There are other unanswered questions. For instance, was there some arrangement with other counties, south of Yorkshire, to receive and pass on the groups towards their far-away destination? Were they transported by some sort of vehicle, or were they expected to tramp the whole distance? What was the system by which the travellers were conveyed over the water, and were those in authority in the islands willing to receive them and on what footing—as prisoners or as colonists?

Another set of entries in the accounts also raise several questions which, in the absence of further information appear to be insoluble. These questions at once present themselves on reading the following entry: "Mr. Hardy, the Contractor, for maintaining, lodging and passing the Poor of Scotland and Ireland on the great North Road, from Bawtry to Kirby Hill, and on the West Road, from Athersedge" (does this mean Hathersage in Derbyshire?) "through Leeds to the North Riding, with branches from Leeds to Littleborough . . . £396." In addition to this mysterious expenditure, there is one other record of a repayment to the constable of Bradford of a sum of £19 1s. 6d. "for conveying the Poor of Scotland and Ireland." (This may mean that as Bradford was off the main south-north route, he conveyed such vagrants to the nearest point on the route which would be Leeds.)

We have, therefore, two plain statements to the effect that (1) a stream of vagrants was flowing from the West Riding to the south, and (2) that another stream was being directed to the north, and the problems which have already been put as to the persons being conducted on the first stage of the long journey to the Channel Islands also present themselves with regard to the Scots and Irish who were being directed towards their native countries.

There were two factors which, in this period at the beginning of the 1830's may have had a considerable bearing upon these somewhat extraordinary arrangements in the West Riding for dealing with the problem of the homeless and the vagrants. The first was the conditions in England at this period—the poverty, the misery, and the unrest amongst the working-classes, who were virtually at the point of insurrection. Crime was rampant, arson, damage and thefts were widespread, and many desperate and hungry people were taking to the roads. In short, we have to realise the full importance of the unrest, the violence, and the absolute poverty of a very large proportion of the population during the Industrial Revolution and the troubles associated with it. Undoubtedly, the very large numbers of cases coming before the justices, and the growing numbers of people on the move from their homes were the signs of the national situation at this time. Conditions in Scotland and Ireland were no better than in England.

The second factor was that a new situation had been created by the Act passed only six years earlier—the Vagrancy Act of 1824. This had abolished the game of battledore and shuttlecock played between parishes, the shuttlecock being the pauper who had moved from the one parish to the other, and the procedure for dealing with these people was not so simple as formerly. The Act expressly excluded from its operation, Scotland and Ireland, and the Isles of Man, Jersey and Guernsey. The authorities (the justices in quarter sessions) may have seized upon this saving clause and placed their own interpretation upon it. Scots and Irish would be easily identifiable by their speech. To conduct all these to the northern frontiers of the county and discharge them into the counties of Lancashire and Durham would seem to be an expeditious way of getting rid of them. Carrying on the mopping-up operations on the useful supposition that all the rest must necessarily be former inhabitants of the Isles of Jersey and Guernsey, it was only necessary to instruct parish constables and gaolers that the unwilling travellers should be conducted to the southern borders and expelled into the neighbouring counties, and the West Riding would be more or less clear, for the time being, of a considerable number of unwanted citizens? It is probably the fact that the justices did not expect or intend that some should eventually reach the Channel Isles, or that the remainder should be ultimately repatriated in their native Scotland or Ireland. The chief anxiety was to get them out of the West Riding.

Transportation

And, lastly, there are some entries throwing a little light upon the dark business of transporting English men and women to the hulks at Sheerness, Chatham, Woolwich and Portsmouth, the first stage on their long and terrible journey to the Antipodes. 146 men and women figure in the accounts submitted for payment by the gaolers of Wakefield and Doncaster, who seem to have been responsible for the safe conveyance of these unfortunates to the southern ports. From the amounts of the expenses incurred it is not possible to find out how the convicts were conveyed. The costs for forty men destined for Sheerness and Chatham were £117 9s. 8d. Twenty-two were taken to Sheerness at a cost of £68 17s. 5d. On the other hand, twenty-one others taken to Sheerness cost considerably more than the twenty-two, £107 8s. 3d. The six women delivered to the hulks at Woolwich cost £29 7s. 3d.

The choice of transport lay between road and water. Goole and Hull were within easy reach of the Wakefield and Doncaster gaols, and it is possible that vessels called to collect waiting gangs of convicts. In winter, or if no vessels were available at Goole or Hull, the long journey must have been by road, probably by stage wagons. Whether by land or sea, the unfortunate outcasts must have suffered grievous hardships, though these hardships were only part, unfortunately, of the horrors of the evil system of transportation. These men and women, forcibly taken from homes and relatives, lay for weeks or months in local prisons. There were long journeys to the crowded and insanitary hulks lying in harbours or tideways. They voyaged for weeks in the holds of the convict ships, manacled and confined. Finally, they were landed in far countries into conditions little better than slavery.

And, if over 150 men and women, mostly convicted of minor thefts, set out on their mournful journeys from the West Riding alone in one year, how many thousands went from the whole of the English towns and counties?

Principles of Punishment

Sentences in the Court of Criminal Appeal

Reported by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v*. GORMAN, the court (Byrne, Slade and Barry JJ.: May 20, 157) reduced a sentence of two years' imprisonment to one of one year's imprisonment. G. had pleaded guilty at quarter sessions to stealing about a gallon of petrol by siphoning it from a car. G., who was a man of twenty-two years of age, had a bad record of three convictions for housebreaking, burglary and larceny since he was seventeen years of age, and had served sentences of Borstal training and nine months' and three years' imprisonment. The court stated that the seriousness of the offence was that it took place when petrol was in short supply and rationed, and they were not surprised that the sessions had taken a serious view, but having regard to all the circumstances two years' was too long a sentence for the theft of this moderately small quantity of petrol.

In R. *v*. STRATTON, the court (Lord Goddard C.J., Hilbery and Devlin JJ.: May 13, 1957) reduced a sentence of four years' imprisonment to one of eighteen months' imprisonment. S. had pleaded guilty at assizes to using an instrument with intent to procure a miscarriage. S., who was a man of twenty-eight years of age, had no previous convictions but had been dealt with twice at juvenile courts for theft. The person on whom he used the instrument was a young woman to whom he was engaged to be married whom he had put in the family way. The court stated that S. was not in any sense a professional abortionist and that the sentence of four years' imprisonment was usually reserved for a professional abortionist. It might be that the judge at the trial had been influenced by the fact that S. had kept the foetus, apparently with a view to using it against the young woman as a threat in the future. But S. was not being charged with blackmail, and the sentence of four years' imprisonment for using an instrument to procure abortion was too severe.

In R. *v.* NORTH, the court (Lord Goddard C.J., Hilbery and Streatfeild JJ.: April 15, 1957) reduced a sentence of four years' imprisonment to one of eighteen months' imprisonment. N. had pleaded guilty at a magistrates' court to fraudulently abstracting electricity and had been sent to quarter sessions for sentence. N., who was a man of twenty-five years of age, had eleven previous convictions. The facts were that N. filed down some halfpennies until they were the size of shillings, when he inserted them in the electricity meter at his home. The court stated that N. seemed to have made efforts to get work since he was last released from prison on April 27, 1956, but he was out of work at the time of the offence and was penniless. The only way of getting heat was by electricity and that was how he came to put the halfpennies in the meter. The court could not overlook the offence because N. ought to have asked for National Assistance and, with his record, it was impossible for the court not to pass a substantial sentence. The sentence of four years' imprisonment was not, however, in the circumstances, justified and would, therefore, be reduced to one of eighteen months.

In R. *v.* AUSTEN, the court (Lord Goddard C.J., Hilbery and Streatfeild JJ.: April 15, 1957) affirmed a sentence of six months' imprisonment imposed on A. for eight offences of shoplifting. A., who was a woman of forty-two years of age, was otherwise of completely good character. The value of the articles stolen was 12s. 11½d. The court stated that shoplifting was becoming serious, and it was appropriate that an offender should not merely be fined, as was so often done.

In R. *v.* PAYNE, the court (Lord Goddard C.J., Hilbery and Stable JJ.: April 1, 1957) reduced a sentence of five years' imprisonment to one of three years' imprisonment. P. had pleaded guilty at a magistrates' court to larceny as a servant and had been sent to quarter sessions for sentence. P., who was a man of forty years of age, had eight previous convictions between 1933 and 1946 but had not been in trouble for eight years prior to the commission of the present offence. His last sentence was one of three years' imprisonment from which he was released on November 3, 1948. The facts were that P. was the manager of a shop who failed to pay moneys received into the bank on the firm's behalf. Just over £500 in all was taken. P. said that he had lost the money on dog racing. The court stated that the chairman of sessions had said to P. when sentencing him: " You have lived a life of crime for many years and the public have to be protected against people like you who do not seem able to keep straight." This was a very bad case, but quarter sessions had obviously overlooked the very material fact that P. had gone straight for eight years. Having regard to P.'s efforts to redeem his character, which had been successful for eight years, the sentence of five years' imprisonment was too severe.

In R. *v.* WATKINS, the court (Lord Goddard C.J., Cassels and Gorman JJ.: March 11, 1957) reduced a sentence of five years' imprisonment for larceny as a servant to one of three years' imprisonment. W. was a man of fifty-one years of age and had two previous convictions for dishonesty. He had been a man of excellent character until 1950. The offences were committed when W. was working as a barman and a sum of £472 in all was taken.

In R. v. BOULDEN (see [1957] Crim.L.R. 182, 322) the court (Lord Goddard C.J., Cassels and Gorman JJ.: March 11, 1957) stated that sentences of six months' imprisonment for each of five offences of wilfully abandoning, and five offences of neglecting, children, all to run concurrently, were inadequate. There was, in that case, no appeal in respect of sentence and the total of six months' imprisonment remained unaltered.

In R. *v.* EYRE, the court (Lord Goddard C.J., Cassels and Gorman JJ.: March 11, 1957) set aside a sentence of twenty-one months' imprisonment and directed that E. be released immediately. E. had pleaded guilty at the Central Criminal Court to bigamy. E., who was a man of twenty-six years of age, had three previous convictions for being found on enclosed premises and for larceny. A decree nisi had been made in respect of E.'s marriage at the time when he went through the second form of marriage. The court stated that the bigamy was here of the most technical description and that the offence was one for which only a nominal sentence should have been passed. If E. had not been sent to prison he could have married the bigamous wife who was, apparently, willing to stand by him. As it was the sentence of imprisonment had prevented him marrying her.

In R. *v.* EVANS, the court (Lord Goddard C.J., Cassels and Hinchcliffe JJ.: February 4, 1957) reduced a sentence of three years' imprisonment to one of twelve months' imprisonment. E. had pleaded guilty at the Central Criminal Court to manslaughter. E., who was a woman of fifty-four years of age, had four previous convictions for minor larcenies. The facts were that E. used a syringe on another woman for the purpose of procuring an abortion; an air embolism was caused as a result of which the other woman died. The court stated that, having regard to the fact that the act was done, according to the evidence, as an act of kindness and there was no suggestion of payment, the sentence of three years' imprisonment was out of all proportion to the offence.

In R. *v.* BALMFORTH, the court (Lord Goddard C.J., Cassels and

Gorman JJ.: February 25, 1957) affirmed a sentence of seven years' imprisonment. B. had pleaded guilty at a magistrates' court to housebreaking and larceny and had been sent to quarter sessions for sentence. B., who was a man of twenty-seven years of age, had twelve previous convictions, mostly for larceny. The court stated that approved schools, probation, Borstal training and imprisonment had all been tried with B., and, if he had been over thirty years of age, this would have been an obvious case for preventive detention. The court agreed with quarter sessions that this man should have a long sentence in order to protect the public.

Practice and Procedure

Quarter Sessions and Assizes

Arraignment on charge of false pretences

Byrne J. in the Court of Criminal Appeal (Byrne, Slade and Barry JJ.: June 3, 1957) made the following observations with regard to the practice of arraigning a prisoner charged with false pretences. It was not sufficient for the clerk of the court to put to the prisoner that he was charged that on a certain day, with intent to defraud, he obtained goods from someone " by false pretences." The false pretences alleged should be put to the prisoner. Where an indictment contained a number of counts in which the false pretences alleged were the same, it was sufficient if the false pretence was read in the first count and thereafter the other counts put on the basis that they contained similar false pretences. A person charged with a criminal offence was entitled to know the substance of the indictment which was preferred against him. [H. P.]

Summary Justice

Animals

Keeping a noisy dog contrary to a local by-law; fined £1, ordered to pay 10s. costs; Dixon: Gainsborough Magistrates' Court (*Manchester Guardian,* June 12).

Cinemas

Allowing cinema to be used on two occasions in contravention of the provisions of certain regulations made in pursuance of sections 1, 2 and 7 of the Cinematograph Act, 1909, and sections 1, 2 (1) (*a*) and the proviso to section 5 (1) of the Cinematograph Act, 1952, namely Regulation 24 of the Cinematograph (Safety) Regulations, 1955, in that an oil-burning heater (other than one forming part of boiler installations) was used in the premises: contrary to section 3 of the Cinematograph Act, 1909, as amended by the Schedule to the Cinematograph Act, 1952; fined total of £40; Aberdeen Walk (Scarborough) Cinema, Ltd.: Scarborough Magistrates' Court (*Scarborough Evening News,* June 17).

Disturbances

"Wilfully and wantonly disturbing" the inhabitants of a Kensington house by ringing the doorbell without lawful excuse, contrary to section 54 (16) of the Metropolitan Police Act, 1839; fined £10; Galletti: West London Magistrates' Court (*Evening Standard*, June 28).

"Blemishing the peace" contrary to the Justices of the Peace Act, 1361, by playing piano accordion outside a bank, and turning somersaults in front of bank staff; ordered to enter into a surety of £25 to be of good behaviour, and to find another surety in £25; Crompton: Birmingham Magistrates' Court (*Evening Standard*, July 3).

Firearms

Selling air pistol and 200 pellets to a boy under the age of seventeen contrary to section 19 of the Firearms Act, 1937; fined £10; Benson: Liverpool City Magistrates' Court (*Liverpool Echo,* June 25).

Food and drugs

Selling sacks of dried milk in which were found two cigarettes and brush bristles, contrary to section 2 of the Food and Drugs Act, 1955; fined £90; Milk Marketing Board: Ipswich Magistrates' Court (*Evening Standard,* June 24).

Fraud

Six charges of obtaining credit by fraud and two of obtaining money by false pretences: the charges arose from tendering worthless cheques in restaurants and, in two cases, obtaining change on them; fined £10 on each count, with alternative of six weeks' imprisonment to run consecutively; Smith: Bow Street Magistrates' Court (*The Times,* June 25).

Case and Comment[*]

Evidence—*View by jury with witnesses—judge absent—British Guiana*

Tameshwar *v.* R.[1] (Judicial Committee of the Privy Council: Earl Jowitt, Lords Tucker and Denning: June 18, 1957) [1957] 3 W.L.R. 157.

T. and S. were convicted by a judge and jury in British Guiana of armed robbery. At the trial, after evidence had been taken in court, the judge directed a view by the jury of the scene of the robbery. This was attended by the accused, counsel and a number of prosecution witnesses. The judge was not present at the view. On appeal by the accused against conviction:—

Held, allowing the appeal, that although the judge need not be present at a view if there were no witnesses, it was very different if witnesses attended and demonstrated to the jury at the scene of the crime; by giving a demonstration a witness was giving evidence just as much as when in the witness-box; it was the essence of a criminal trial that it must be decided on the evidence before the court and that the judge and jury must be present throughout the giving of the evidence. In the present case the absence of the judge during part of the trial was such a departure from the essential principles of justice that the trial could not be allowed to stand. [J. D. P.]

Commentary. The conviction was quashed notwithstanding section 45 of the Criminal Law (Procedure) Ordinance (Laws of British Guiana, 1953, c. 11) which makes provision for a view " upon the terms and conditions to the court or the judge seeming proper "; and notwithstanding the practice of judges in British Guiana over many years not to attend a view by the jury. The power given by section 45 " must be exercised in accordance with the fundamental principles of a fair trial: and one of these principles is that every piece of evidence given by a witness must be given in the presence of the tribunal which tries the case: and the tribunal is not the jury alone, but the judge and jury."

The reason why the procedure followed in the present case violated the fundamental principles of a fair trial is that it is the duty of the judge to sum up the evidence and he can do this properly only if he has heard it all.

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[*] Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab), Barrister-at-Law.

[1] For the appellants: *Bernard Gillis Q.C., J. Lloyd-Eley* (instructed by *Druces & Attlee*). For the Crown: *J. G. Le Quesne* (*Charles Russell & Co.*).

Firearms—*Harpoon gun—necessity of licence*

POLICE *v.* LANE[2] (Plympton (Devon) Magistrates' Court: June 17, 1957).

The defendant, L., pleaded not guilty to a charge under the Gun Licence Act, 1870, of carrying and using a gun without having a licence in force under that Act. The facts were that L. was the owner of an Italian harpoon gun known as a "Mares Bess C" harpoon gun, and that on April 27 he and S., a sixteen-year-old boy, had gone swimming, taking the harpoon gun with them. L. loaded the gun and put the safety catch "on." The boy S. was about 8 to 10 yards in front of L. when the gun went off, causing the harpoon to enter S.'s right leg. L. could give no explanation of why the gun went off, as the safety catch was "on." The only defence offered was that the defendant had been told, when he bought the gun, that it did not need a licence.

Held, that the harpoon gun was a gun within the meaning of the Gun Licence Act, 1870. The defendant was fined 10s.

COMMENTARY. The term "gun," as defined by the Gun Licence Act, 1870, s. 2, "includes a firearm of any description and an air gun or any other kind of gun from which any shot, bullet, or other missile can be discharged."

According to the *Manchester Guardian,* June 18, 1957, the defence contended that "the conviction would cause a turmoil in the gun industry and would have far-reaching effects." Yet a harpoon gun seems plainly to fall within the statutory definition.

The Act requires a payment for a licence of ten shillings a year by "every person who shall use or carry a gun in the United Kingdom." Section 7 imposes a penalty of £10 for carrying or using a gun without a licence, otherwise than in a dwelling-house or the curtilage thereof.

Mutiny—*Disobedience not amounting to defiance of authority*

R. *v.* GRANT, DAVIS, RILEY AND TOPLEY[3] (Courts-Martial Appeal Court: Lord Goddard C.J., Byrne and Devlin JJ.: June 21, 1957) (*The Times,* June 22, 1957).

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[2] For the defendant: W. E. J. Major, Solicitor, Plymouth.

[3] For the appellants Grant and Davis: *Joseph Dean* (instructed by the Registrar, Courts-Martial Appeal Court). For the appellants Riley and Topley: *Kenneth Harrington* (instructed by the Registrar, Courts-Martial Appeal Court). For the Crown: *E. Garth Moore* (instructed by the Director of Army Legal Services).

G. and the other appellants were convicted by a general court-martial at Nicosia, Cyprus, of mutiny contrary to section 7 of the Army Act, 1881. The facts were that there was a considerable disturbance in the appellants' barracks on the night in question during which the appellants had, amongst other things, surrounded a sentry post and demolished the barber's shop. They had refused to disperse when ordered to do so by a warrant officer. They appealed to the Courts-Martial Appeal Court against their convictions on the main ground of misdirection. It was contended that the judge advocate, intervening during counsel's address to the court, had misdirected the court in saying that it was not possible to charge men with joint insubordination because that amounted to mutiny.

Held, dismissing the appeals, that mutiny was an offence constituted by collective insubordination but the mere disobedience of an order by two or more men at the same time did not necessarily amount to mutiny. Insubordination meant a refusal to subordinate oneself to authority and a mere failure to obey an order, for example, a man going to a place that he had been told was out of bounds, did not amount to insubordination unless there was a defiance of authority. If what the judge advocate had said in his intervention had led the officers of the court-martial to believe that every act of disobedience by two or more men at the same time would amount to mutiny, then it would have been a misdirection. The judge advocate had concluded his summing-up with these words: "On that evidence, sir, you have got to say whether you are satisfied that the purpose of these men was, as alleged by the prosecution, to get their grievances heard that night at all costs, no matter what authority was going to do about it, in which case you will probably hold that it amounted to a mutiny or whether you are satisfied that all it was was a rather disorderly prank done with no intention of defying authority, in which case you may take the more merciful view and hold that it was not a mutiny." That put the matter as fairly as it could possibly be put and there were no grounds for interfering with the convictions. [H. P.]

COMMENTARY. The distinction between disobedience amounting to a defiance of authority and disobedience not so amounting is not easy to follow. It seems that any knowing disobedience is, to some extent, a defiance of authority. The Lord Chief Justice illustrated the distinction thus: "A soldier who deliberately went to an area designated out of bounds to troops was guilty of disobedience not insubordination, but if he met an officer who directed him to leave the area and the soldier refused so to do, then it became insubordination as it showed a clear intention not to subordinate himself to authority" (*The Times,* June 22). Is not this a distinction between open disobedience on the one hand (which is a defiance of authority, and therefore, insubordination) and secret disobedience on the other (which is not)?

The Army Act, 1881, has been replaced by the Army Act, 1955, with effect from January 1, 1957. The new Act contains a definition of mutiny in section 31 (3).

Statutory Offence—*Date of coming into force of Act of Parliament*

R. *v.* LOGAN AND OTHERS [4] (Courts-Martial Appeal Court: Lord Goddard C.J., Byrne and Devlin JJ.: June 21, 1957) (*The Times,* June 22, 1957).

L. was convicted before a district court martial in Hong Kong of an assault occasioning actual bodily harm contrary to section 70 of the Army Act, 1955. The offence took place in Hong Kong on January 1, 1957, at 2.30 a.m. Hong Kong standard time. L. appealed to the Courts-Martial Appeal Court on the ground that the Army Act, 1955, which came into force on January 1, 1957, was not in force in Hong Kong at the time this offence was committed by reason of the fact that Hong Kong time was some hours in front of Greenwich mean time.

Held, dismissing the appeal, that if an Act was to come into force on January 1 then it came into force on the day which was January 1 in the place where it had to be applied. It did not make any difference that it was January 1 in Hong Kong a few hours before it was January 1 in England. Accordingly the appeal would be dismissed. [H. P.]

Weights and Measures—"*Actual offender*"—*liability of company.*

MELIAS, LTD. *v.* PRESTON [5] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Devlin JJ.: May 24, 1957) ([1957] 3 W.L.R. 42; [1957] 2 All E.R. 449).

The appellants were a limited company owning a grocery store in which they employed a manager, who was in charge of the shop and was responsible for seeing that all articles weighed in the shop were weighed and made up for sale in accordance with section 4 of the Sale of Food (Weights and Measures) Act, 1926. In October, 1956, an inspector of weights and measures entered the store and weighed the contents of certain pre-packed articles of food including 13 packets of lard and 10 packets of peas. Each of the packets was of short weight. At the time the manager was absent with leave from the store. Two weeks later an inspector entered the store and, in the presence of the manager, weighed a packet of butter which was also of short weight. On three informations preferred under section 4 (2) of the Act of 1926, the appellants were convicted, but informations preferred by the appellants against the manager pursuant to section 12 (5) were dismissed. On appeal by the appellants:—

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[4] For the appellants: *David Lloyd* (instructed by the Registrar, Courts-Martial Appeal Court). For the Crown: *E. Garth Moore* (instructed by the Director of Army Legal Services).

[5] For the appellants: *John Thompson Q.C., J. M. Davies* (instructed by Arthur Taylor & Co., for Mace & Jones, Liverpool). For the inspector: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co., for R. M. Willis, Warwick). For the manager: *Sproule Bolton* (instructed by Thompson, Quarrell & Megaw for Blythe, Owen, George & Co., Leamington Spa).

Held, allowing the appeal, that the words " actual offender " in section 12 (5) meant the person whose act or default brought about the particular circumstances that constituted the offence; that it was due to the acts of the manager that the offences were committed and, therefore, while the conviction of the appellants stood, they were exempt from penalties, but the manager should be convicted and penalties be imposed on him.

The Lord Chief Justice said that the magistrates felt bound to follow the earlier Divisional Court decision in *Walkling* v. *Robinson* (1930) 46 T.L.R. 151. The observations in *Walkling* v. *Robinson* were, however, inconsistent with *Hitchin* v. *Hindmarsh* [1891] 2 Q.B. 181, which was not cited in *Walkling.* Lord Goddard therefore concluded that he was not bound to follow the expressions in *Walkling.* Presumably either the first or the third exception was applicable. Hilbery J. took the view that the observations in *Walkling* were *obiter*, not being necessary for the decision, and that they were made *per incuriam.* Devlin J. simply agreed in the result. [J. D. P.]

COMMENTARY. Where a servant is handling his master's goods in the course of his employment, the possession of the goods, in law, remains in the master and the servant is said merely to have " custody." If this strict legal meaning of possession is applied to an offence such as that created by section 4 (2) of the Sale of Food (Weights and Measures) Act, 1926, where the *actus reus* is simply being in possession of certain things, it follows that a servant handling his master's goods can never be guilty because he can never have possession while he continues to act in the course of his employment. It can hardly be doubted, however, that such a construction would have defeated the legislature's intention in enacting section 12 (5).

The Divisional Court, sitting as a final court of appeal in criminal matters, regards itself as bound by its own decisions in the same manner, and subject to the same exceptions, as the civil Court of Appeal:

Huddersfield Police Authority v. *Watson* [1947] 1 K.B. 842, 846. The exceptions to the rule as laid down by the Court of Appeal in *Young* v. *Bristol Aeroplane Co., Ltd.* [1944] K.B. 718 are: (1) The court is entitled and bound to decide which of two conflicting decisions of its own it will follow. (2) The court is bound to refuse to follow a decision of its own which, though not expressly overruled, cannot, in its opinion, stand with a decision of the House of Lords. (3) The court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.

Acts and Orders*

Agriculture

AGRICULTURE (FIRST AID) REGULATIONS, 1957 (S.I. No. 940): operative August 1, 1957. The Agriculture (Safety, Health and Welfare Provisions) Act, 1956 ([1956] Crim.L.R. 636) provides that certain first aid materials and appliances must be provided for agricultural workers. The quantities and descriptions of these first aid materials and appliances are now prescribed, and an employer of agricultural workers is required to provide a first aid container containing prescribed materials for each thirty (or fewer) workers employed by him, but no employer is required to provide more than three such containers on any one agricultural unit.

For penalties for contravention, see section 14 of the Act.

Aliens

ALIENS (APPROVED PORTS) ORDER, 1957 (S.I. No. 909): operative May 22, 1957. In the Schedule to the Aliens (Approved Ports) Order, 1954, which, as amended, designates the ports which are approved for the purposes of the Aliens Order, 1953, the list of airports is altered by adding Lympne and substituting Bristol (Lulsgate) for Bristol (Whitchurch).

Birds

WILD BIRDS (WICKEN SEDGE FEN SANCTUARY) ORDER, 1957 (S.I. No. 1015): operative July 1, 1957. The Wild Birds Protection (Cambridgeshire) Order, 1953 (S.I. 1953, No. 1225) is revoked in so far as it applies to Wicken Sedge Fen. Article 1 establishes a bird sanctuary with boundaries somewhat different to those established under the 1953 Order, and Articles 2 and 3 specify actions which are declared to be offences against the Protection of Birds Act, 1954. These include the wilful taking, killing or injuring of any wild bird or attempting to do so, or the taking and destroying of any egg of any wild bird within the sanctuary.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

For penalties for contraventions, see section 12 (2) of the Protection of Birds Act, 1954.

Customs and Excise

EXPORT OF GOODS (CONTROL) (AMENDMENT NO. 4) ORDER, 1957 (S.I. No. 950): operative June 5, 1957. The Order of 1956 (S.I. No. 1702; [1957] Crim.L.R. 64) is further amended, so that licences are no longer required to export goods (other than those specified in the First Schedule) to China, North Korea, North Viet Nam, Tibet or Macao.

For penalties for contraventions, see section 3 of the Import, Export and Customs Powers (Defence) Act, 1939.

Magistrates' Courts

MAGISTRATES' COURTS ACT, 1957 (5 & 6 Eliz. 2, c. 29): operative June 6, 1957, except for sections 1, 2 and 3, which are operative September 6, 1957. The primary object of the Act is to give effect to the recommendations of the Departmental Committee on the Summary Trial of Minor Offences (Cmd. 9524).[1]

Section 1 provides that, where a summons has been issued requiring a person to appear before a magistrates' court (other than a juvenile court) to answer an information for an offence which must be tried summarily, the court may, if he has notified in writing his desire to plead guilty, hear and dispose of the case in his absence, whether or not the prosecutor is also absent, as if both parties had appeared and the accused had pleaded guilty. The accused must have been served with a statement of the facts of the case, and the accused's notification of his plea of guilty without appearing, the facts, and any written submission by the accused in mitigation, must be read out in open court. Generally speaking, where the court proceeds under section 1 the prosecutor will not be allowed to make any further statement as to the facts; the court may not impose imprisonment, detention or disqualification without first adjourning; section 1 (4) deals specially with offences relating to national insurance; section 1 will not apply to any offences which may be specified in statutory instruments made under section 1 (5).

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[1] See [1955] Crim.L.R. 538.

On the summary trial of an information for an offence to which the Road Traffic Act, 1930, s. 113 (1), as extended by the Road Traffic Act, 1956 (4 & 5 Eliz. 2, c. 67), s. 32 (which relates to road traffic and allied offences relating to vehicles) applies, the court may accept as evidence the accused's written admission that he was the driver of the vehicle in question on the occasion to which the information relates (s. 2). Where a magistrates' court (other than a juvenile court) convicts a person of a summary offence the court may, in his absence, take account of any alleged previous conviction of a summary offence of which notice has been served on him at least seven days before the hearing (s. 3). Section 4 makes a consequential amendment of the Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55), s. 15 (2), which restricts the issue of warrants for the arrest of accused persons in case of non-appearance. Section 5 extends the power to mitigate penalties conferred on magistrates' courts by section 27 of the 1952 Act to penalties imposed by enactments passed after, as well as those passed before, the operation of the 1951 Act.

The Act does not extend to Scotland or Northern Ireland (s. 6 (3)). It is to be construed as one with the 1952 Act, and both may be cited together as the Magistrates' Courts Acts, 1952 and 1957.

Medicine

DENTISTS ACT, 1957 (5 & 6 Eliz. 2, c. 28): operative September 6, 1957. Various earlier enactments relating to dentists and other dental workers are consolidated, with corrections and improvements authorised under the Consolidation of Enactments (Procedure) Act, 1949 (12, 13 & 14 Geo. 6, c. 33). These earlier enactments begin with the Dentists Act, 1878 (41 & 42 Vict. c. 33), and comprise five statutes in all, ending with the Dentists Act, 1956 (4 & 5 Eliz. 2, c. 29 (see [1956] Crim.L.R. 351).

Section 15 provides for the use of titles and descriptions by registered dentists, dental surgeons or dental practitioners, and provides for the penalties for any contravention of the use of such titles and descriptions. Section 16 deals with the appointment of a registrar and assistant registrar to keep the dentists' register, and prescribes the penalty for any registrar wilfully making, or causing to be made, false entries in that register. Sections 25–31 deal with disciplinary matters. By section 32 registered dentists may claim exemption from jury service. Part III of the Act sets out the restrictions on the practice of dentistry by non-registered dentists and prescribes the penalties for contravening those provisions of the Act. Part IV substantially re-enacts that part of the 1956 Act which deals with ancillary dental workers.

For penalties for contraventions, see sections 15, 16, 34, 35, 37, 38 and 41 of the Act, which substantially re-enact the equivalent provisions in the Dentists Act, 1956, the details of which are given in [1956] Crim.L.R. 351.

Rent Restriction

RENT ACT, 1957 (5 & 6 Eliz. 2, c. 25): operative July 6, 1957. This Act amends the Rent and Mortgage Interest Restrictions Acts, 1920 to 1939, the Rent of Furnished Houses Control (Scotland) Act, 1943, the Furnished Houses (Rent Control) Act, 1946, the Housing (Repairs and Rents) (Scotland) Act, 1954, and certain other enactments relating to rent control and the right of tenants to retain possession of houses.

The Rent Acts cease to apply to houses the rateable value of which on November 7, 1956, exceeded £40 in London and Scotland, and £30 elsewhere in England and Wales. Contraventions against various penal provisions in the earlier Acts are restricted accordingly.

Section 2 lays down a procedure for increasing rents of houses which remain subject to control, and this requires, *inter alia*, the service of a notice of increase. A landlord making a false or misleading statement or representation in such a notice shall be liable on summary conviction to a maximum fine of £50 unless he acted innocently and without intent to deceive (s. 2 (4)).

Section 12 (6) makes it a duty of the landlord to provide a rent book or similar document in respect of tenancies falling within the provisions of the Furnished Houses (Rent Control) Act, 1946; and failure to comply with this duty within two months of the commencement of this Act (*i.e.*, by September 6, 1957) is an offence for which the landlord and any person demanding or receiving rent for him is liable on summary conviction to a maximum fine of £10 in respect of each week in which the failure occurs.

Section 2 of the Landlord and Tenant (Rent Control) Act, 1949, made it an offence for any person to require the payment of a premium in addition to rent. Section 14 of the Act extends the provisions of the 1949 Act to cover cases where a loan, instead of a premium, is demanded.

Section 15 prohibits a landlord from demanding rent in advance for premises decontrolled by this Act, and the penalty for contravention is a maximum fine of £100 on summary conviction. The court which convicts the landlord may also order him to repay to the tenant the rent wrongfully demanded (s. 15 (2)).

Section 17 makes provision to facilitate the exchange of controlled dwellings, and where any person demands certain pecuniary reward as a term of such an exchange he is liable on summary conviction to a maximum fine of £100. The court may also order the pecuniary reward to be repaid (s. 17 (4)).

Revenue

EXCHANGE CONTROL (AUTHORISED DEALERS) (AMENDMENT) ORDER, 1957; (AUTHORISED DEPOSITARIES) (AMENDMENT) ORDER, 1957; (S.I. Nos. 1026 and 1027): both operative June 18, 1957. The list of banks and other persons authorised to deal in gold and foreign currency, and the list of authorised depositaries with whom certain securities are required to be deposited, under the provision of the Exchange Control Act, 1947, are amended.

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

Road Traffic

MOTOR VEHICLES (CONSTRUCTION AND USE) (TRACK LAYING VEHICLES) (AMENDMENT) (NO. 2) REGULATIONS, 1957 (S.I. No. 972): operative June 23, 1957. The 1955 Regulations (S.I. No. 990; [1955] Crim.L.R. 583) are amended by making it unnecessary to exhibit a speed limit disc on any vehicle, or to mark, on the near side of a motor tractor or a heavy motor-car, the maximum speed at which the vehicle may be driven.

MOTOR VEHICLES (CONSTRUCTION AND USE) (AMENDMENT) (NO. 2) REGULATIONS, 1957 (S.I. No. 971): operative June 23, 1957. The 1955 Regulations (S.I. No. 482; [1955] Crim.L.R. 393, as amended by S.I. 1956, No. 540; [1956] Crim.L.R. 433, and by S.I. 1957, No. 359; [1957] Crim.L.R. 337) are further amended. The principal changes are: (1) The maximum permitted overall length of four-wheeled public service vehicles registered before July 1, 1956, is increased from 27 to 30 feet (reg. 2 (2)); (2) the provisions as to the fitting on certain vehicles of brakes which do not operate directly on the wheels are modified (reg. 2 (5)); (3) it is no longer necessary to exhibit a speed limit disc on any vehicle or to mark, on the near side of a tractor or a heavy motor-car, the maximum speed at which the vehicle may be driven (reg. 2 (6) and (7)).

For penalties for contraventions, see rule 104, and sections 111 and 113 of the Road Traffic Act, 1930.

Solicitors

SOLICITORS ACT, 1957 (5 & 6 Eliz. 2, c. 27). This Act consolidates the Solicitors Acts, 1932 to 1956, and certain other enactments relating to solicitors, with minor corrections and improvements. By the SOLICITORS ACT (COMMENCEMENT) ORDER (S.I. 1957, No. 1194) this Act is operative from July 15, 1957.

For penalties for contraventions, see sections 18 (unqualified person acting as a solicitor), 19 (unqualified person pretending to be a solicitor), 20 (unqualified person drawing or preparing certain documents and instruments), 21 (unqualified person acting in certain probate matters), 22 (offences against the Act by bodies corporate), 34 (solicitor acting as agent for unqualified person so as to enable the unqualified person to act as a solicitor), 35 (solicitors commencing or defending actions whilst in prison), 37 (failure to disclose having been struck off the roll), 39 (offences in connection with orders controlling employment of certain clerks), 47 (penalties payable on hearing of disciplinary proceedings before disciplinary committee).

The Act does not extend to Scotland or Northern Ireland save for certain provisions of section 5 which relate to the admission of overseas solicitors as solicitors in England and Wales.

Wireless Telegraphy

WIRELESS TELEGRAPHY (GENERAL LICENCE CHARGES) AMENDMENT (NO. 1) REGULATIONS, 1957 (S.I. No. 978): operative July 31, 1957. The principal Regulations (S.I. 1954, No. 439; [1954] Crim. L.R. 481) are amended by reducing from £3 to £2 the issue and renewal fees payable for each station after the first two comprised in a private mobile radio licence, and making corresponding reductions in the fees payable on the variation of such a licence. Two new forms of licence are added to Part I of the First Schedule to the principal Regulations, and the issue and renewal fees payable in respect of them are specified.

For penalties for contraventions see section 14 of the Wireless Telegraphy Act, 1949.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

34. *Judges Rules*

It is appreciated that the "Judges" Rules are merely intended for guidance to Police Officers and are not intended either to cramp police investigations, or to be translated too literally. I would, however, appreciate your guidance on two points on these rules.

Rule No. 8. If A, B and C are jointly involved in a criminal offence, and during the investigations into that offence A and B elect to make a written statement admitting their guilt, but C refuses to make any form of statement, should C be furnished with a copy of the written statements of A and B?

Rule No. 2. In a complicated inquiry, such as fraud, it is often necessary to prepare the interrogation of a suspected person, or indeed a person who has already made it clear by his words or conduct that he is guilty, by writing out a series of questions which are intended to be put to that person, on the subject of the inquiry. Can you foresee any objection to administering the caution to such a person and then putting the questions prepared to him, and recording his answers, afterwards to be signed by him? [G. H. R.]

ANSWER

On the first question, Rule 8 says that C should be furnished with a copy of the written statements of A and B and nothing should be said or done by the police to invite a reply. Although the judge has a discretion to admit any statement obtained in contravention of the Rules, if the police wish to make use of any statement that C might make, they are well advised to adhere to the rule strictly. If C persists in saying nothing, then it seems that there is no need to give him copies of the other statements. After all the only sanction to the Rules is the exclusion of an otherwise admissible statement, and if C makes no statement, there is no "penalty" for failing to give him copies.

On the second question, it is assumed that the person concerned is not in custody—if he is, any interrogation except for the purpose of removing ambiguity in a statement already made by him is contrary to the spirit of Rules 3 and 7 (see Archbold, 33rd ed., § 683). If he is not in custody but merely suspected, Rule 2 allows him to be questioned after caution, and there seems to be no objection to the questions being in written form. [D. W. E.]

Letters to the Editor

Restitution in Criminal Proceedings—Courts-Martial

Sir,

May I draw your attention to the paragraph dealing with Courts-Martial in the article "Restitution in Criminal Proceedings" at [1957] Crim.L.R. 385–386.

Mr. Howard's authorities in this case appear to be out of date and I would like to point out that the relevant sections are now sections 138 of the Army Act, 1955, and the Air Force Act, 1955.

Section 15 of the Courts-Martial (Appeals) Act, 1952, has also been repealed, and subsection (9) of section 138 above makes provision for the suspension of Orders pending appeal. Court-Martial Appeal Rules, 1952, Nos. 6 and 19 also apply.

Yours faithfully,
Charles E. Hall (Lieutenant).

British Forces Post Office No. 1.

[Mr. Howard writes: "I am obliged to your correspondent for drawing attention to this slip and apologise to my readers."]

Books and Periodicals

Reviews:

The Law in Action. A series of broadcast talks. Vol. 2. London: Stevens & Sons, Ltd. 1957. viii and 134 pp. (10s. net.)

Law in Action, Sir Alfred Denning tells us in his Foreword, is now well established as the longest regular series of talks on any subject that has been given in the Third Programme. The remarkable success of the series is well merited by the high quality of the talks, and the publishers are to be congratulated on rescuing from oblivion a selection of those given between April, 1954, and the end of 1955.

The two essays which are of special interest to readers of this Review are Dr. R. M. Jackson's " Driving while under the Influence " and Dr. Norval Morris's " The Body Vanishes." Dr. Jackson is critical of the judges' interpretation of " being in charge," but hopes that the Road Traffic Act, 1956, has got over that particular difficulty. The problem which remains unsolved is that of proving satisfactorily the requisite degree of intoxication. Dr. Jackson thinks that, until we have a machine which is capable of accurately measuring a person's reactions, satisfactory proof is not possible, and so he suggests that we should make a fresh start with a new crime of driving, etc., whilst having a body fluid concentration of *x* per cent. or more of alcohol, whether drunk or not. This proposal is not prompted simply by a desire to achieve certainty in the law. At present, Dr. Jackson thinks, very many drivers who are affected by drink are not charged simply because of the difficulty of proof. Under the proposed new law some drivers who were perfectly capable of controlling their vehicle would probably be convicted; but it is certainly arguable that the public interest requires such a law.

Dr. Morris is also concerned with difficulties of proof but of a rather different kind. In " no body murders " should we require a higher degree of proof of the *corpus delicti* than the traditional " beyond reasonable doubt "? Dr. Morris, disagreeing with Dr. J. Ll. J. Edwards (see [1955] Crim.L.R. 205, 214), thinks we should. It may be accepted that there is no absolute standard of proof, even in criminal cases, and that the weight of the evidence required varies according to the seriousness of the allegation: *cf. Hornal* v. *Neuberger Products* [1956] 3 W.L.R. 1034. It is less easy to accept that two issues in the *same* case have to be established by the prosecution with differing degrees of certainty. Is not proof that it was the accused who committed the crime in every way as important as proof that the crime was committed?

J. C. Smith.

They Hanged My Saintly Billy. By Robert Graves. Cassell and Co., Ltd. 1957. 269 pp. (21s. net.)

This is the story of William Palmer, a Victorian villain whose fame lives on in Madame Tussaud's Chamber of Horrors, on whose account his home town sought to change its name (unfortunately, the Prime

Minister, Lord Palmerston, agreed on condition that the town should be named after him), and who gave Staffordshire that expressive public house phrase, "What's your poison?"

Mr. Graves has written this book to prove that Palmer "never killed nobody." The picture he draws, as told by an unknown contemporary of Palmer's, is bold, vigorous and full of details of the more seamy side of life. The racecourse descriptions are particularly vivid. But throughout Palmer is seen as the reprobate he undoubtedly was, and Mr. Graves' attempt to make us view the evidence from another and more favourable angle fails. If ever a man was well hanged Palmer was. The only real question raised by the book comes at the end with the public hanging of Palmer in 1856, the horror of which caused an outcry against capital punishment. If Mr. Graves had been more concerned with that moral issue his book might have merited more attention, as it is, it is difficult to take its purpose seriously.

J. D.

Underworld U.S.A. By Joseph F. Dinneen. London: Cassell & Co., Ltd. 1957. 238 and xvi pp. (15s. net.)

Mr. Dinneen, a crime reporter of twenty-five years' standing, writes about crime in a typical American city. The two central figures are Earl Connor, the leader of a crime syndicate, and yet a man whose spoken word is his bond, and pickpocket "Fingers" Tolland, who takes part in armed robbery, but is devoted to his daughter and, like so many criminals, longs to be respectable. The author's experience has given him a shrewd insight into the reasons behind his characters' reactions to given situations. The book succeeds in exposing the difficulty of suppressing crime in a system where law, politics and crime so freely intermingle and men like Connor can play an important role in elections; where defending lawyers are for the most part more able than those prosecuting; and where little attempt is made to reform criminals in prison.

The style is too colloquial and it is difficult to disentangle fact from embroidered narrative.

M. S. A.

The Sexual Criminal. A Psychoanalytical Study. 2nd edition. By J. Paul de River, M.D., F.A.C.S., Founder and Director of the Sex Offense Bureau, City of Los Angeles. Springfield, Illinois: Charles C. Thomas. 1957. xx, 353, and (glossary and index) 23 pp. (50s. net.)

Workers concerned with problems presented by sexual offenders can hardly fail to find interest in a book based on seventeen years' experience of the founder and director of the Sex Offense Bureau at Los Angeles, if only because of the complete absence of any similar institution in this country. The English reader may be confused by the inclusion of certain crimes, such as sadistic homicide, not classified as "sexual offences" in English legal terminology. The reason for this is that the general concept and classification of sexual offences in English law depends on the presence and nature of an overt sexual act; whereas Dr. de River adopts the medical (and more logical) course of including in the term any crime whose object is the gratification of a sexual desire.

Three-fifths of the book consists of case histories taken from a wide range of sexual offenders, and grouped under the headings of sadism and masochism. The remainder of the book can be divided into two sections: the one consisting of a series of short studies by a prison officer, a judge, a police officer, a crime writer, and an attorney; the other being a study of the psychological aspect of criminal investigation contributed by the author himself. This section is notably inconsistent with the subtitle of the book—" a psychoanalytical study," and the reader is in for a big surprise. Mention of Freud, the founder of the psychoanalytical school, is conspicuous by its absence, even in the discussion on aetiology, though the author seems to recognise the importance of the Oedipus myth. Furthermore Dr. de River expresses his " accord " with Kurt Schneider and his " hearty agreement " with Eugene Kahn on matters which are directly contrary to the beliefs of the psychoanalytical school. Perhaps the ultimate departure from the subtitle is in the author's recommendations for the treatment of homosexuals, *viz.*, " Spartan living, hard work, educational methods, suggestive therapy, and last but not least, electric shock therapy." It would appear that the author's experience of the treatment of the sex murderer is no greater than that of most English-speaking psychiatrists who, for the most part, have been deprived of opportunity by operation of the law in this country, and are likely to remain so in spite of the recent legislation. He does, however, discuss castration, but without any reference to the work of Stürup and the institution of Herstedvester. Nor does he refer to his own experience, though Professor Tappan has recently said that California has resorted to castration with the " consent " of the offender in many cases. He concludes, with all seriousness: " But the pernicious practice of castration is not the answer for the problem as the castrate will continue to be a menace to society, unless, of course, the operation were to be performed in infancy, and certainly to declare a helpless infant a potential sex offender, is not only pre-judging things, but taking an awful lot upon one's shoulders." Statements of this quality appear with unfortunate frequency in the text. In view of our own experience of the results of lobotomy on character and self-control, current psychiatric opinion in this country will be dismayed by the author's claim that " if we are to resort to radical methods, it would be more rational to perform the operation of lobotomy." Judge Joseph Call, who contributes a militant chapter on the judicial view, reinforces this with the terse statement that " We must remember that the fault is in the mind and not the testicles." Criminal lawyers will experience much difficulty with the author's chapter entitled, " The Will and its medico-legal importance," which abounds with confused thinking and self-contradiction, and is embellished by some curious theological reasoning which your reviewer does not feel qualified to criticise, *viz.*, " The human ego is the son of man (spiritual son), belonging to a man, and as part of him it is in reality him."

No review of this book would be complete without mention of the photographic illustrations. Many of them are unnecessary as contributing little if anything to the text, some of them are undesirable in a book which purports to be a psychoanalytical study, and can be of value only to forensic pathologists. A photograph of the results of a sadistic assault and dismemberment of a woman can serve little purpose apart from ensuring the book a ready sale in the Charing Cross Road.

A description or diagram would have done equally well. The value of this book lies in the reports of cases within the author's own experience, but once he goes outside these limits its shortcomings are immediately apparent.

J. D. J. HAVARD.

Evidence in Criminal Cases. By F. L. Bunn. London: Sweet & Maxwell, Ltd. 1957. 96 and (index) 20 pp. (10s. 6d. net.)

Police Training invariably includes instruction upon the law relating to court procedure and it has always been questionable whether this teaching is of great value. It is often claimed that, in most cases, an officer requires no detailed knowledge of the subject until he reaches senior rank and is given the responsibility of acting as police representative in courts of law.

No such controversy arises, however, concerning tuition upon one aspect of the subject—the rules of evidence. This is a matter which must be appreciated by the humblest police recruit. Whilst the judiciary may be tolerant when the testimony of a member of the public is not according to the book, they expect an understanding of the rules of evidence to be apparent when a police officer testifies.

Mr. Frank L. Bunn, Ex-Chief Constable of Stoke-on-Trent, in his work, *Evidence in Criminal Cases,* provides a first class instruction book for the police on this important subject. The author approaches the matter from every angle—academic principles, statutory requirements, case law decisions—and all are simply and lucidly explained. Neither does he overlook the practical side. Methods of collecting fingerprint impressions and footprints are described; the procedure for conducting identification parades is included.

This is the third edition of *Evidence in Criminal Cases.* It should be in every police officer's library.

CHARLES E. DYER.

Famous Australasian Crimes. Tom Gurr and H. H. Cox. London: Muller. 1957. 192 pp. (13s. 6d. net.)

The World's Strangest Murders. By Bernard O'Donnell. London: Muller. 1957. 223 pp. (15s. net.)

Behind the Face of Crime. By Laurence Wilkinson. London: Muller. 1957. 224 pp. (16s. net.)

Famous Judges and Their Trials. A century of justice. By Leonard Gribble. London: John Long. 1957. 192 pp. (15s. net.)

Each of these books contains collections of murder cases. The first two will be the most interesting to readers of this country since they collect together murders from other parts of the world and only one or two will be familiar to readers here. *The World's Strangest Murders* contains thirteen bizarre crimes, all of them unusual either in setting or in the way which the crime was committed. This volume does not, as is stated on the dust-jacket, contain a description of the murder in New Zealand committed by two teenage girls of the mother of one of them. This account is to be found in *Famous Australasian Crimes,* a volume whose setting is mainly in Australia and one which shows that murder is committed for the same reasons and in the same way in all parts of the world.

Behind the Face of Crime tells the stories of a number of crimes familiar to many readers in this country. Amongst others it deals with Billy Hill, Jack Spot, Janet Marshall, Emmett Dunne, the House-Boat case and many others.

The collection of cases in *Famous Judges and Their Trials* contains many that have been written about very often before. It starts with the case of Maria Manning and covers a number of well-known murders including Rouse, Heath, Christie and ending with the trial of William Hepper.

P. A.

This Friendless Lady. By Nigel Morland. London: Muller. 1957. 254 pp. (18s. net.)

Mrs. Maybrick was convicted of the murder of her husband and sentenced to death on August 7, 1889; two weeks later she was reprieved. She died in 1941. The decision in the case was one which resulted in considerable controversy at the time, and in this book the author has presented an extremely readable reconstruction of the whole case.

P. A.

Books Received:

The Road to Tyburn. By Christopher Hibbert. London: Longmans, Green & Co., Ltd. 1957. 149 and (bibliography, glossary and index) 12 pp. (16s. net.)

Policeman's Lot. By Harry Söderman. London: Longmans, Green & Co., Ltd. 1957. 368 pp. (18s. net.)

College Harry. By David Elias. London: Longmans, Green & Co., Ltd. 1957. 254 pp. (16s. net.)

Reader's Digest:

Binding over: Competency of spouses: 121 *Justice of the Peace* 375.

Criminal proceedings: The application of the "without prejudice" rule: 121 *Justice of the Peace* 393.

Food and drugs: Foreign bodies in food: 101 *Solicitors' Journal* 454.

Homicide: Self-defence: 13 *The Magistrate* 67.

Judges' rules: Administering a caution: 121 *Justice of the Peace* 423.

Licensing law: Selling intoxicating liquor other than during permitted hours: 65 *Police Review* 450.

Practice and procedure: Fitness to plead (based on *R.* v. *Beynon* and *R.* v. *Roberts*): 223 *Law Times* 335.

Road traffic: Carriers' licences for agricultural vehicles: 65 *Police Review* 428.

Road traffic: Reception order following second conviction for dangerous driving: 121 *Justice of the Peace* 424.

THE
CRIMINAL LAW
REVIEW

Editors
JOHN BURKE and PETER ALLSOP, M.A.
Barristers-at-Law

Editorial

Appeals in criminal cases

The Attorney-General has been violently assailed for not granting his fiat to enable Vickers to appeal to the House of Lords from the dismissal by the Court of Criminal Appeal [1] of his appeal against a conviction on a charge of capital murder. Where the life of a murderer is at stake the most violent passions are aroused. The Court of Criminal Appeal, as finally constituted, of five judges, found the appellant guilty of murder because he killed a person with the necessary malice aforethought being implied from the fact that he intended to go grievous bodily harm. Vickers hit an old woman (who died of her injuries) to avoid being recognised while committing a burglary, and the court found that the only effect of the Homicide Act, 1957, was that the fact that he was committing a burglary was to be ignored. That, of course, made no difference whatever in this case.

It is difficult to see how on these facts any lawyer could discover "a point of law of exceptional public importance" within the meaning of section 1 (6) of the Criminal Appeal Act, 1907. It would have been easy for Sir Reginald Manningham-Buller to say that as this was the first appeal on a new Act on a charge of capital murder which aroused exceptional public interest he had better grant his fiat. But he chose to perform his quasi-judicial function to the best of his judgment as a Law Officer and to endure the attacks which he must have known would be launched against him.

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[1] *R.* v. *Vickers, post,* p. 614.

We publish in this issue [2] a contributed article which examines the case of Vickers in particular and the system of appeals to the House of Lords in criminal cases generally. To those who criticise the system the invitation is extended to devise another which is as cheap, informal and swift as the present one.

Strikes and trade disputes (picketing)

The Home Secretary stated that standing instructions issued by the Commissioner of Police for the Metropolis covered the provisions of the law relating to strikes and trade disputes. Twenty-seven arrests had been made on charges arising from violence and hooliganism in the London market dispute; there were 10 convictions and in the other 17 cases the persons concerned have been remanded on bail. The figures for similar offences in the provincial bus strike are not available. (H.C. Debates, Vol. 574, cols. *247*, *248*, August 1.)

Police reports

The Report of the Commissioner of Police for the Metropolis for 1956 [3] and the Report of Her Majesty's Inspectors of Constabulary for 1956 [4] show that the police forces in London and the provinces are facing many problems in common.

Both reports show a marked increase in crime, for which no single cause or combination of causes can be found. This is counterbalanced to some extent by an improvement in the strength of the police forces throughout the country; wastage of manpower has lessened considerably and recruiting is showing better results.

Besides the reports on recruiting and statistics on crime, both reports contain information on police training and methods, on road traffic and transport problems and many other allied subjects.

Alternatives to short terms of imprisonment

In 1955 the Home Secretary, then Mr. Gwilym Lloyd George, asked the Advisory Council on the Treatment of Offenders to examine the possibility of devising suitable alternatives to some of the short terms of imprisonment now imposed by the courts. The

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[2] *Post*, p. 566.

[3] Cmnd. 222. H.M.S.O. (5s. net).

[4] H.M.S.O. (1s. 4d. net).

Council's report, presented to Mr. Butler on May 30, 1957, has now been published.[5]

The terms of imprisonment considered were those of less than six months' duration, which constitute about two-thirds of the total number of sentences imposed. The prisoners serving them on any one day made up 10 per cent. of the prison population.

The Council did not consider that alternatives were desirable in all, or even in most, cases where a short term of imprisonment was imposed. Nevertheless, there are some cases, *e.g.*, fine defaulters, chronic alcoholics, women guilty of child neglect, husbands defaulting on maintenance orders, where the nature of the offence suggests that, prima facie, prison is unsuitable and useless. It would also seem that there is another less definite class of offender for whom alternative treatment would be desirable. This category consists of prisoners who, having been convicted of some criminal offence such as larceny, are sentenced to short terms of imprisonment without the option of a fine. The term of imprisonment is, in these cases, too short to train or deter, and, in many cases, only serves to contaminate the offenders.

The alternatives suggested are as follows:—

Adult attendance centres. The setting up of adult attendance centres is a proposal which has been greeted somewhat warily by the Council, who consider that such centres, lacking the stigma attached to prison, would not deter and might be regarded with contempt. They suggest, however, that the statutory power which already exists under section 48 (2) of the Criminal Justice Act, 1948, to set up attendance centres for offenders between 12 and 21 years old, should be exercised to set up, on an experimental basis only, a centre for male 17 to 21 year-olds. When these have been established, the Council suggests that the age limit should be extended in accordance with the success of the experiment.

Increased fines. The Council consider that the imposition of fines of an amount higher than that now imposed in some cases where the offender is sentenced to a short term of imprisonment, might have a greater deterrent value than such a term.

Chronic alcoholics. The difficulty in separating the various classes of alcoholic has led to the Council's recommending no special treatment for habitual drunkards, except in occasional cases where the courts might consider probation with a requirement to undergo treatment for mental condition or requiring the offender to enter into a recognisance to be of good behaviour.

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[5] *Alternatives to Short Terms of Imprisonment.* H.M.S.O. (2s. net).

Attachment of wages. The Council considered the problem of husbands defaulting on payments under a maintenance order with reference to the man who is exposed in prison to the risk of contamination with criminals. After considering the Scottish system of arrestment the Council concluded that there was no reason why a similar system should not work in this country. The Private Member's Bill (Maintenance Orders (Attachment of Income) Bill) at present before the House of Commons represents the sort of scheme the Council have in mind.

Extension of the Criminal Justice Act, 1948, s. 17, to adult first offenders. The Council recommend that the provisions of this section which deals with persons under 21 years of age, should be extended so that imprisonment shall not be imposed on any first offender unless the court is of the opinion that no other method of dealing with him is appropriate.

Supervision pending payment of a fine and remands for inquiry. The Council recommend that the courts should be reminded of their powers to order supervision pending payment of a fine and to remand for inquiry before sentence.

The Council conclude their report by pointing out that the subject before them is but one small part of the wide field of penology. The implications of some of the points considered by them went far beyond their terms of reference. They were struck by the fact that there has been no authoritative inquiry for a long time into such fundamental problems as the objects of punishment, the suitability of the existing method of dealing with offenders, the desirability of introducing new ones and the procedure for determining what is the appropriate method in a particular case.

The Home Secretary is considering the report and has sent copies to all clerks to justices, asking them to bring it to the notice of the justices.

When is a mascot . . . ?

On July 12, the Huddersfield Stipendiary Magistrate, after an adjournment of three weeks, dismissed two summonses against Mr. Walter Harrison for offences under the Motor Vehicles (Construction and Use) Regulations, 1955. The offences alleged that, first, he used a 1955 Ford Zephyr car with a mascot in such a position that it was likely to strike any person with whom the vehicle might collide, and so cause injury; secondly, that a fitting attached to the top of the bonnet was in such condition that danger was caused. The "mascot" in question was the "Dying Duck" emblem which is fitted to all Ford Zephyr cars.

In dismissing the first summons the magistrate had recourse to the *Oxford Dictionary* which defined "mascot" as "a person or thing, animate or inanimate, supposed to bring luck." The magistrate considered that the Ford emblem could not be so regarded. As far as the second summons was concerned, the magistrate thought that the regulation under which the summons was brought was aimed at the maintenance of the vehicle and not at its construction.

12s. 6d. on four legs

This was how Alfred Hardinges described his feelings towards cats to the Greenwich magistrates when with his brother and sister-in-law he was found guilty of stealing ten cats, some of which were produced in court. The police asked for 710 other cases to be taken into consideraton: Hardinges objected to this and the magistrates refused to include 502 cases concerning cats belonging to unknown persons. The three accused then admitted the remaining 208 cases. They were each sentenced to six months' imprisonment. When apprehended Hardinges had admitted to the police that they had been stealing cats from various districts of South-East London for more than a year. The cats were sold to a dealer for 12s. 6d. each.

Oxford or Borstal?

An interesting experiment in human relations has recently taken place in the shape of a summer camp at Spennithorpe, Wensleydale, where a number of Oxford undergraduates spent a week under canvas with a number of Borstal youths aged between 18 and 20. Discipline at the camp was kept to a minimum, but there were no complaints from neighbours. The assistant governor of the Borstal institution at Hatfield from which the boys came said that he had been moved by the experiment and hoped that it might be possible to extend it, depending on the results. For himself, he had never seen better reactions from his charges.

Move along there, please . . .

Two summonses for assaulting a police officer in the execution of his duty and for contravening two Hyde Park regulations were dismissed by the Marylebone magistrate on August 8. The police officer had asked William Corbett who was sleeping on a bench in the park to move, and Corbett had assaulted him. The magistrate said that he doubted whether a police officer had any power to require a member of the public to move when he was committing no greater offence than "not being as well dressed or as clean as some other people are." He also doubted whether the officer's decision could be in no way questioned in a court of law.

The rivals

Two gangs of thieves, described by prosecuting counsel as "Two rather amateurish bungling groups of people," both raided the same shop on the same night. Each gang mistook the other for the police and argument ensued as to which side represented the law. On discovering that neither did they decided to join forces. As a result of this night's work, four men were found guilty of breaking into the shop and stealing a safe: a fifth pleaded guilty to breaking and entering and a sixth admitted receiving the safe. All six had one or more previous convictions.

Radar for detecting speeding

The doubts expressed by us last month as to the usefulness and accuracy of radar equipment for detecting speeding offences are shared by the A.A. who are contesting the use of the device, and by the R.A.C. who are "suspicious" of it.

In Lancashire, however, the equipment is now operational, principally on the A 6 road north from Preston. Motorists detected by it on its first outing were reported as being impressed and humbled by its efficiency. It involves the use of two police cars: a stationary "plain clothes" car and a more ostentatious police car with police signs, siren and aerials, for chasing the offenders once they have been spotted.

At present motorists are being stopped at the rate of twelve an hour and it does not seem likely that the rate can be increased. Meanwhile the Lancashire police force have ordered more radar sets.

On August 19 the magistrates at Leyland, Lancashire, imposed a fine for the first speeding conviction based on the evidence of a radar timing machine. Charges against three defendants represented by the motoring organisations were adjourned *sine die* to allow the defence experts time to study the device.

Parliament

Admission to Borstal Allocation Centres

The Home Secretary said that boys under the age of 17 awaiting admission to a Borstal Allocation Centre were detained in prison. There were now 295 boys in the Borstal reception centre at Wormwood Scrubs on June 28, 1957. The process of allocation lasted from six to eight weeks. The average time spent awaiting transfer after allocation was 22 days. (H.C. Debates, Vol. 572, cols. *1290*, *1291*, July 4.)

Judicial appointment

Mr. Alter Max Hurwitz has been appointed Recorder of the Borough of Halifax.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Appeals to the House of Lords

The case of *R.* v. *Vickers*[1] has focused attention once more on the provision in the Criminal Appeal Act, 1907,[2] by which appeals lie to the House of Lords only on the certificate of the Attorney-General. Much of the comment on the case, both in the press and in the House of Commons, was not only inspired but also coloured by the fact (which was not material to the question of appeal) that Vickers was convicted of capital murder and, in the event, the Attorney-General found it easy enough to justify his decision. It is, however, on the face of it anomalous that what is apparently a purely judicial process should be subject to questioning and debate in Parliament[3] and the proposals for amending the existing law ought therefore to receive serious consideration. The object of this article is to assess their weight.

The present form of the provision seems to have been something of an afterthought, for the Criminal Appeal Bill which received its Second Reading in 1907 provided that the decision of the Court of Criminal Appeal should be final, and it was not until the Report Stage[4] that the Attorney-General, Sir John Lawson Walton, moved the amendment which led to the subsection taking the form in which it reached the Statute-book, namely—

> "If in any case the director of public prosecutions or the prosecutor or defendant obtains the certificate of the attorney-general that the decision of the Court of Criminal Appeal involves a point of law of exceptional public importance, and that it is desirable in the public interest that a further appeal should be brought, he may appeal from that decision to the House of Lords, but subject thereto the determination by the Court of Criminal Appeal of any appeal or other matter which

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[1] [1957] 3 W.L.R. 326.

[2] Section 1 (6). There is an analogous provision in s. 7 (1) of the Courts-Martial (Appeals) Act, 1951, which differs in that an application may be made to the Attorney-General only if there has been an appeal (and not merely an application for leave to appeal) to the court. The distinction is, however, not one of substance: see note 42, below.

[3] In 1911 Horatio Bottomley asked the Attorney-General why he had refused to grant a certificate in the case of Steinie Morrison: 23 H.C. Deb. 2007. The next Question was that put by Mr. Sydney Silverman about Vickers on July 17: 573 H.C. 1146, and the first debate was on Mr. Silverman's motion of censure about the same case on August 1: 574 H.C. Deb. 1623–1655.

[4] 178 H.C. Deb. 1062.

> it has power to determine shall be final, and no appeal shall lie from that court to any other court."

Though it may have been an afterthought, the provision was not a novelty. The principal object of the Criminal Appeal Act was to replace the unsatisfactory method of reference to the Court for Crown Cases Reserved[5] by a truly appellate procedure, but there already existed before 1907 a concurrent remedy by way of appeal direct to the House of Lords; and it was this procedure, the appeal by writ of error on the fiat of the Attorney-General, which formed the basis of the amended version of section 1 (6) of the Criminal Appeal Act.

The procedure by writ of error was even less satisfactory than the procedure under the Crown Cases Act, for the writ ran only where the error appeared on the face of the record and, as Stephen pointed out, " the record takes no notice either of the evidence or of the direction by the judge to the jury," with the result that " the grossest errors of fact or law may occur without being in any way brought upon the record."[6] It was with the express purpose of avoiding this difficulty that Sir John Lawson Walton's amendment specified the conditions which had to be satisfied before the Attorney-General could grant his certificate and in support of his formula he observed that " in cases where strong public feeling was excited and jurists were divided in opinion, it was only the judgment of the highest court of the Realm that would be universally accepted."[7] This was not perhaps the happiest description of the object of the subsection, for, even before the days of newspapers with mass circulations, jurists could probably be relied on to be unanimous about those cases which excited public feeling, while the public for its part was wholly indifferent to those which divided the jurists. A better view of its effect was, it may be thought, put forward by Sir Hartley Shawcross, then Attorney-General, during the debates in the Standing Committee on the Criminal Justice Bill in 1948: the two questions the Attorney-General has to answer when he receives an application are, said Sir Hartley, first, whether the decision of the Court of Criminal Appeal turns on an arguable point of law and second, whether that point is of sufficiently general application to be described as of "exceptional public importance." [8] In practice that would seem to mean—and it is reasonable to suppose that Parliament intended it to mean—that the cases referred to the House of Lords should raise questions of general import involving either the construction of statutes or the solution of disputed problems of common law.

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[5] Crown Cases Act, 1848, giving statutory effect to (and extending to Quarter Sessions) the practice by which the trial judge could, after conviction, reserve a point of law for the opinion of the judges. The most unsatisfactory feature of the system was that its operation depended wholly on the discretion of the trial judge. For a fuller account, see Stephen's *History of the Criminal Law*, Vol. 1, Chap. X. The Crown Cases Act procedure was preserved by the Criminal Appeal Act (see s. 20 (4) and rule 26 of the Criminal Appeal Rules, 1908) but no use has been made of it since, it is believed, *R.* v. *Cade* [1914] 2 K.B. 209, and it can probably be regarded as at least obsolescent.

[6] Stephen, *History of the Criminal Law*, Vol. 1, p. 309, which sets out with characteristic clarity the law and practice prevailing before 1907.

[7] 178 H.C. Deb. 1062.

That would at any rate appear to be the interpretation that has always been placed on the subsection. The tests it imposes are stringent and it is not perhaps surprising that only nineteen certificates have been granted.[9] Of those nineteen cases seven involved questions of the construction of statutes and the remaining twelve questions of common law. It might be thought that the point of construction raised in *Milne* v. *Commissioner of Metropolitan Police* [10] was a little esoteric; that the point at issue in *Stirland* v. *D. P. P.*[11] was too fine to qualify as one of exceptional public importance; and that the argument of the appellant in *Wicks* v. *D. P. P.*[12] was not substantial enough to merit the consideration of the House of Lords; but there can surely be no doubt at all about the other four cases [13] and it seems right that where, as happened in these three, the unsuccessful appellant is the applicant for the Attorney-General's certificate, he should be given the benefit of such doubt as exists in the Attorney-General's mind.

The certificates granted in the twelve cases involving questions of common law also suggest an inclination towards more generosity than one would expect to find in a court of law. Three of them involved cases where the defence of provocation had been unsuccessfully pleaded to a charge of murder[14]: whatever one's views on capital punishment, it must be conceded that provocation is properly a matter of mitigation of sentence which, in the case of murder, has been elevated to the rank of a substantive defence only because the penalty is both automatic and irrevocable[15]; its application gives rise to many difficulties precisely because it is, so to speak, an artificial defence, but it does not give rise to questions of law in the sense contemplated by the Criminal Appeal Act. Of a fourth case[16] Lord Sumner, expressing his regret that the Attorney-General's certificate had been granted, said—

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[8] Standing Committee A, March 9 and 11, 1948, *passim*.

[9] There is also, it may be thought, some force in Stephen's comment on the rarity of writs of error that "the criminal law is now for the most part so well settled and understood that this is a matter of little practical importance." Four of the nineteen certificates were granted on the application of the prosecution; two of these appeals succeeded and in a third the decision of the Court of Criminal Appeal was affirmed on another ground after the Crown's argument on the point of law had been sustained: *R.* v. *Christie* [1914] A.C. 545. Five of the remaining fifteen appeals were successful and in one of the other ten the conviction was upheld by applying the proviso to s. 4 (1) of the Criminal Appeal Act, 1907: *Stirland* v. *D. P. P.* [1944] A.C. 315.

[10] [1940] A.C. 1. The question was the construction of s. 1 of the Betting Act, 1853. This is the only case under s. 1 (6) of the Criminal Appeal Act in which the Director of Public Prosecutions has not been made respondent.

[11] [1944] A.C. 315.

[12] [1947] A.C. 362.

[13] *Leach* v. *R.* [1912] A.C. 305; *Felstead* v. *R.* [1914] A.C. 534; *Maxwell* v. *D. P. P.* [1935] A.C. 309; and *Joyce* v. *D. P. P.* [1946] A.C. 347.

> "It raises no new principle of law; it elucidates no new aspect of familiar principles. It is a mere question of the application of the rules of evidence to this particular case."[17]

and the same could be said with equal force of the very first case in which a certificate was granted.[18] Lord Oaksey used language of a similar character in his dissenting opinion in *Harris* v. *D. P. P.*,[19] but, as his criticism was expressly based on the view that the other four law lords regarded as admissible evidence which they expressly held to be inadmissible, the Attorney-General's decision in that case may perhaps be thought to have withstood the challenge. The decision in the remaining six cases[20] has not even been challenged.

It is in the nature of things less easy to be satisfied that certificates have not been refused when they should have been granted, since, except in the more notorious murder cases, the public does not usually know whether an application has been made. Study of the Criminal Appeal Reports does not suggest that there have been many cases where, if an application was made, the Attorney-General can have found very much difficulty in refusing it and for the purposes of this article it should be sufficient to refer shortly to two cases where his decision has provoked comment in the press and two where, it seems, the legal profession expected a certificate to be granted. The first pair are *R.* v. *Casement*[21] and *R.* v. *Blackburn*[22]; the second pair, *R.* v. *Algar*[23] and *R.* v. *Newland*.[24]

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[14] *Mancini* v. *D. P. P.* [1942] A.C. 1; *Holmes* v. *D. P. P.* [1946] A.C. 588; and *Bedder* v. *D. P. P.* [1954] 1 W.L.R. 1119, which enjoys the unhappy distinction of being the only case under s. 1 (6) to be deemed unworthy of inclusion in the *Law Reports* proper.

[15] See the conclusion of Viscount Simon's judgment in *Holmes* v. *D. P. P.* [1946] A.C. 588, 601.

[16] *Thompson* v. *R.* [1918] A.C. 221.

[17] *Ibid.*, at 236.

[18] *R.* v. *Ball* [1911] A.C. 47.

[19] [1952] A.C. 694, 713. This is not the only odd feature of the case. It is apparent from Viscount Simon's judgment that a certificate was granted primarily to enable the House of Lords to resolve the apparent conflict between *R.* v. *Sims* [1946] K.B. 531 and *Noor Mohamed* v. *R.* [1949] A.C. 182. The evidence which had been admitted against Harris was not, however, admissible on the principles propounded in either of those two cases.

[20] *D. P. P.* v. *Beard* [1920] A.C. 479; *Woolmington* v. *D. P. P.* [1935] A.C. 462; *Andrews* v. *D. P. P.* [1937] A.C. 576; *Davies* v. *D. P. P.* [1954] A.C. 378; and *Board of Trade* v. *Owen and Seth-Smith* [1957] 2 W.L.R. 351.

Little needs to be said about the first pair. So far as Casement is concerned, a dispassionate study of the judgment of the Court of Criminal Appeal makes it abundantly clear that the argument submitted on his behalf was simply not tenable[25]; so far as Blackburn is concerned, the court was dealing only with the question whether an established and undisputed principle of law had been applied correctly[26]: if the Attorney-General had granted his certificate he would, therefore, have exposed himself to the very criticism which, in *Thompson* v. *R.*, Lord Sumner made of his predecessor.[27]

About the other two cases one can only speculate. It seems possible, however, that in *Algar's* case the Attorney-General may have felt himself inhibited from granting a certificate by the fact that in the Court of Criminal Appeal counsel for the Crown abandoned the one point which was worthy of argument in the House of Lords[28]; and some at least of the comment on *Newland's* case seems to have been based on the misconception that, until that decision, a conspiracy to effect a public mischief was an offence by virtue only of the fact that effecting a public mischief was itself a substantive offence (so that a conspiracy to effect it was analogous rather to a conspiracy to commit forgery than to a conspiracy to defraud).[29]

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[21] [1917] 1 K.B. 98. Every proposal to amend s. 1 (6) of the Criminal Appeal Act has been based at least in part on the refusal of a certificate in this case: see the Parliamentary Question addressed to the Prime Minister by Mr. Philip Snowden on August 2, 1916: 85 H.C. Deb. 306; the debates on the Criminal Justice Bill in Standing Committee A on March 9 and 11, 1948; and the speech of Mr. Montgomery Hyde on July 31, 1957, in support of his motion for leave to introduce an amending Bill: 574 H.C. Deb. 1274.

[22] (1955) 39 Cr.App.R. 84, note. And see [1955] Crim.L.R. 459.

[23] [1954] 1 Q.B. 279, in which, on the application of the Crown, the appellant was admitted to bail under s. 16 (2) of the Criminal Justice Act, 1925, pending an application for the Attorney-General's certificate: [1953] 3 W.L.R. 1007, 1012.

[24] [1954] 1 Q.B. 158.

[25] Dispassionate study has never been easy. Many people, and not only Irishmen, have always thought of Sir Roger Casement as a hero; the legal issues were clouded by public knowledge of the personal animosity between him and the Attorney-General; and the tone of the judgment of the Court of Criminal Appeal, which was delivered by Darling J., proves, even today, an obstacle to those who have the good fortune to be immune from the political and private controversies aroused by the case. But it is impossible to regard as very persuasive an argument which necessarily involves the rejection of the considered opinion of Coke, Hale and Hawkins.

[26] It was common ground that the onus lay on the prosecution to prove its case and to prove it beyond a mere balance of probabilities. What was disputed was the question whether the judge made that clear to the jury. It may reasonably be argued that the Court of Criminal Appeal was wrong in holding that he did; but that does not imply that the court's judgment involved a point of law of exceptional public importance.

[27] [1918] A.C. 221, 236.

The decisions in individual cases have not, then, attracted criticism of much weight. Proposals for an amendment of the law, however, have generally been based on expressions of general principle; thus the most vigorous criticisms of the refusal of certificates to Casement and Vickers were founded on the assertion (commonly stated as if it were self-evident) that it is wrong to entrust to the very person responsible for initiating the prosecution—and particularly wrong if he has himself conducted the prosecution—the duty of deciding whether an appeal should lie. It is not clear why either the initiation or the conduct of a prosecution should disable a Law Officer from recognising a point of law of exceptional public importance; and it is unprofitable to look for any appearance of logic in a system which permits an appeal to a court presided over by a member of the Cabinet. The gravamen of the charge against the present system seems, however, to lie in the apparent anomaly, mentioned at the beginning of this article, that Parliament should treat as a political issue the decision whether an appeal should lie from one court to another.

The charge, so framed, is not, however, so easy to substantiate as has often been thought and its weakness becomes apparent directly the alternative solutions are subjected to any sort of critical scrutiny. In substance only one other solution has been put forward, but its form has varied according to whether the advocate has sought to draw an analogy with appeals in civil cases to the House of Lords[30] or with appeals in criminal cases to the Judicial Committee of the Privy Council.[31] With regard to the first of these analogies it is sufficient to quote what Sir Hartley Shawcross said in the course of the debate on the Criminal Justice Bill to which reference has already been made—

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[28] *i.e.*, the question whether the decision in *Monroe* v. *Twistleton* (1802) Peake Add.Cas. 219, applies to criminal cases.

[29] The decision in *R.* v. *Newland* did not affect *R.* v. *Manley* [1933] 1 K.B. 529, because conspiracy to effect a public mischief is an offence irrespective of the fact that effecting a public mischief is an offence (whereas a conspiracy to commit forgery would presumably cease to be an offence if forgery itself were made lawful). In view of the comments on *R.* v. *Manley* which were made in *R.* v. *Newland* (at 168) it seems likely that the Attorney-General would be glad of an opportunity to refer the earlier case to the House of Lords, a probability increased by the dicta of Lord Oaksey in *Joshua* v. *R.* [1955] A.C. 121.

> "It is most unlikely either in murder cases or those which are not capital offences that the House of Lords would, I suppose, ever grant leave to appeal unless, on hearing the petition for leave to appeal, it came to the conclusion that it was not certain, but probable, that the decision in the Court of Criminal Appeal was wrong, and that if the application for leave to appeal were granted the ultimate appeal would succeed."[32]

With regard to the second analogy it is necessary to cite only the oft-quoted observation of Lord Watson that "Her Majesty will not review or interfere with the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done."[33] The decisions in such cases are judicial decisions, in the sense that they are proper questions for a court of law; but the tests which, in the one case, the House of Lords and, in the other, the Judicial Committee apply are not the tests which the Criminal Appeal Act requires the Attorney-General to apply. It may legitimately be urged that such tests ought to be applicable to appeals to the House of Lords in criminal cases; but to discuss (as most critics of the present system have discussed) the question who should apply the tests before deciding what tests should be applied is to put horse and cart in a juxtaposition more familar to lawyers than to draymen.

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[30] *e.g.*, Mr. E. F. Iwi, in a letter to *The Times* published on July 22, 1957. And see [1955] Crim.L.R. 459.

[31] *e.g.*, Mr. Montgomery Hyde, M.P., supporting his motion for leave to introduce the Criminal Appeal Act (Amendment) Bill: 574 H.C. Deb. 1274-1278. Leave was given, but it may safely be assumed that the Bill will make no further progress before Parliament is prorogued on November 1.

[32] Standing Committee A, March 9, 1948, 1379. *The Times* of July 24 reports Jenkins L.J. as saying in reply to an application for leave to appeal to the House of Lords in *Griffith* v. *Pelton* (*ibid.*), that "it was a tempting prospect to have two or three new pages written into Woodfall and the other textbooks, but there was no particular reason why the defendant's clients should pay for this conveyancing feat." And see *Patterson* v. *Ellis* [1957] 1 W.L.R. 857.

[33] *Re Dillet* (1887) 12 App.Cas. 459, 467, cited by Viscount Simon L.C. in a review of the grounds on which leave will be granted by the Judicial Committee: *Muhammad Nawaz, alias Nazu* v. *King-Emperor* (1941) L.R. 68 Ind.App. 126, 128. And *cf. Mohindar Singh* v. *King-Emperor* (1932) L.R. 59 Ind.App. 233, 235, *per* Lord Dunedin: "There must be something so irregular, or so outrageous, as to shake the very basis of justice."

The question which the Attorney-General has to decide—and this is the justification of the present system—is not, however, purely judicial. Both Sir Hartley Shawcross[34] and the present Attorney-General[35] have described his function as quasi-judicial—judicial in so far as he has to determine whether the case involves a point of law of exceptional public importance, administrative or ministerial (and therefore subject to parliamentary scrutiny) in so far as he has to determine whether it is in the public interest that a further appeal should be brought. It has never been altogether clear in what circumstances an Attorney-General could properly withhold a certificate on the grounds of public interest in a case where he was satisfied that the decision of the Court of Criminal Appeal involved a point of law of exceptional public importance, but there is no need to cavil on that account at the description of the Attorney-General's function as quasi-judicial: the decision that a point of law is of " public " importance is a decision of a political[36] character which, it is suggested, is rightly the subject of question and debate in the House of Commons.[37]

It is not the purpose of this article to examine in any detail the merits of the present system, but, since any other procedure would almost certainly involve something in the nature of a judicial hearing, it may be worth pointing out that the method of application for a certificate of the Attorney-General is cheap, informal and swift. Nothing more than a letter of application is required to bring the proceedings to the notice of the Attorney-General[38]; the letter must be dispatched within seven days of the decision of the Court of Criminal Appeal[39] and the Attorney-General regards himself as *functus officio* once it has been dealt with.[40] The result is that it is rare for a case to remain undisposed of for more than two weeks after the order of the Court of Criminal Appeal has been drawn up[41] and, while the delays inherent in a system of appeal by leave of the courts have almost certainly been exaggerated,[42] it seems unlikely that so expeditious a procedure could be applied by them.

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[34] Standing Committee A, March 11, 1948, 1405.

[35] 574 H.C. Deb. 1648.

[36] But not, of course, party political.

[37] Mr. Sydney Silverman, M.P., who moved the motion of censure on the Attorney-General in connection with *R.* v. *Vickers*, said in the course of the debates on the Criminal Justice Bill: " There has never been a case, and I hope that there never will be, whatever the fate of this clause, in which the Attorney-General can be questioned in the House of Commons in a matter of this kind. I do not believe the Table would accept such a Question, or ought to, and I think that it would be entirely wrong if the Attorney-General were able to be harried in Parliament by Questions, perhaps on party grounds, and Supplementary Questions, and perhaps an Adjournment Debate, because he gave an unsatisfactory answer as to whether he had exercised a judicial function in the proper way ": Standing Committee A, March 11, 1948, 1406. The words were, of course, flung back at him in the debate on his motion of censure: 574 H.C. Deb. 1652.

[38] It is understood that if the applicant is in prison he is allowed a special letter for the purpose, *i.e.*, one not counting against his ordinary entitlement.

It seems equally unlikely that any procedure capable of being substituted for the existing system would have resulted in John Willson Vickers being granted leave to appeal to the House of Lords. Vickers, it will be recalled, was convicted of capital murder on evidence which (the jury must be taken to have found) showed that he killed by acts done with an intent to cause grievous bodily harm. On appeal reliance was placed on section 1 (1) of the Homicide Act, 1957, which provides that

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[39] Criminal Justice Act, 1925, s. 16 (1).

[40] In *Ex p. Blackburn* [1956] 1 W.L.R. 1193, 1197, Singleton L.J. doubted whether the Attorney-General was *functus officio*. It is to be observed, however, that the question before the Court of Appeal on that application was not whether the Attorney-General had power to reconsider his decision, but whether he could be compelled to reconsider it by mandamus. It is also to be observed that if the Attorney-General is not *functus* when he has disposed of an application he has, presumably, power to reconsider any of his decisions (and possibly also those of his predecessors) without any limit of time, a result so anomalous that one may be permitted to doubt the wisdom of the late Lord Justice's doubts.

Blackburn's application seems in any event to have been hopelessly misconceived. If, as he argued, the decision in his case had been in effect overruled by subsequent decisions, the appropriate remedy would have been by way of petition to the Home Secretary seeking, if necessary, a reference to the court under s. 19 of the Criminal Appeal Act, 1907.

[41] Time runs under s. 16 (1) of the Criminal Justice Act, 1925, from the date when the order is drawn up, a fact which may cause embarrassment if, as has sometimes happened in capital cases, the order is drawn up before the court gives its reasons: see, for example, *R.* v. *Semini* [1949] 1 K.B. 405. It is noteworthy that at the end of the argument in *R.* v. *Dunbar* [1957] 3 W.L.R. 330, the court acceded to a request by the Attorney-General that the order should not be drawn up until its reasons were given.

[42] See, for example, the Attorney-General's speech on August 1, 1957 (574 H.C. Deb. 1651) and *The Times* of the same day, which was obviously influenced by the number of applications for the Attorney-General's certificate in the preceding twelve months. There were 129 applications; but a glance at the criminal statistics shows that the majority of them must have been in respect of refusals of applications for leave to appeal which cannot have involved a point of law at all, still less one of exceptional public importance. If the law were amended there would presumably be no question of an appeal to the House of Lords except where the appeal to the Court of Criminal Appeal had been made either as of right or on a judge's certificate. The number of such appeals in the six years 1950–1955 was 5, 4, 30, 28, 16 and 5, 2, 3, 0, 5, 5, respectively. It will be recalled that in 1952 the court ordered that all applications for leave to appeal against convictions for murder should be listed as appeals. This fact accounts for the sharp increase in recent years, as many as fifteen of the sixteen appeals in 1955 being appeals against conviction for murder. The courts could certainly deal expeditiously with appeals on this scale.

> "Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence."

It was argued that a person who kills by acts done with an intent to commit grievous bodily harm kills "in the course or furtherance of some other offence," *viz.*, an offence against section 18 of the Offences against the Person Act, 1861, and is not therefore liable to be convicted of murder unless he knew, or ought as a reasonable man to have known, that his acts were likely to cause death. The short answer in law to this ingenious argument was put, with devastating effect, by Slade J., in argument: causing grievous bodily harm is not, in these circumstances, "some other" offence than the killing; it is part of the killing.[43]

The Attorney-General was therefore, it is suggested, fully justified in describing the argument as untenable[44]; indeed, it is probably fair to say that it would never have been put forward if Vickers had not been charged with capital murder. There was also, however, what may be called a good political reason for the refusal of his certificate, a reason which, moreover, may be regarded as a strong argument in favour of the Criminal Appeal Act in its present form. When the Homicide Act was being considered in the House of Commons the then Home Secretary referred to section 1 in the following terms—

> "Its effect is that a killing in the course of a felony, resisting an officer of justice, avoiding or escaping from legal custody or from arrest will not be murder unless it is done with intent to kill, or to do grievous bodily harm; in other

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[43] There was, it is suggested, an equally short answer on the facts, for the substance of the judge's direction was that the jury should convict if they were satisfied of an intent to cause grievous bodily harm in the ordinary sense of those words.

[44] 573 H.C. Deb. 1147; 574 H.C. Deb. 1650. The Attorney-General was plainly embarrassed by the facts that when the appeal was first heard it was adjourned for argument before five judges and that in adjourning it the Lord Chief Justice referred to the point as one "of great importance." It is not very easy to understand why the court found any difficulty in reaching a conclusion which, in the event, was unanimous; but, however that may be, the Attorney-General's concern is with the court's decision, not with the process by which it is reached.

> words, unless it is murder in its own right, so to speak, irrespective of the fact that it is done in the course of a felony or other offence to which I have referred."[45]

Those words might well be adapted as a précis of the judgment of the Court of Criminal Appeal in *R.* v. *Vickers*,[46] but yet more support for the Attorney-General's decision is to be found in the debates on the Committee stage. Amendments were then moved by the Opposition[47] with the express purpose of making it clear beyond doubt, on the one hand, that the section bore the meaning ascribed to it by the Home Secretary and, on the other, that it was incapable of bearing the very meaning subsequently ascribed to it by the defence of Vickers, whose effect would, it was said, be to render the section "nugatory,"[48] "meaningless,"[49] and "unintelligible."[50] The amendments were rejected; but it may well be asked how any Attorney-General could have regarded it as in the public interest to afford the House of Lords an opportunity of preferring an interpretation described—and, it is suggested, rightly described—in such terms as these.

Causation in Homicide—A Medical View

By Francis E. Camps, M.D., and John D. J. Havard, M.A., LL.B., M.B., *Barrister-at-Law*

The case of *Jordan*[1] has reopened the question whether the defence can impeach the quality of the medical treatment of the victim where death follows a wound which is dangerous to life. Until *Jordan* was decided the reported cases left little doubt upon the question. The accepted principle of law was well illustrated by the words of Erle J. in *Pym* [2]:—

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[45] 560 H.C. Deb. 1153.

[46] And it is therefore very strange that the first motion of censure on the Attorney-General, which received sixty-nine signatures before its sponsor, Mr. Silverman, withdrew it, deplored his refusal to allow Vickers to appeal to the House of Lords "so as to establish on the highest judicial authority whether or not s. 1 of the Homicide Act effectively abolishes the doctrine of constructive malice and prevents a man from being liable to be convicted of murder who had no intention either to kill or to do grevious bodily harm."

[47] 561 H.C. Deb. 244–299.

[48] 561 H.C. Deb. 280 (Sir Frank Soskice Q.C.).

[49] 561 H.C. Deb. 294 (Mr. Reginald Paget Q.C.).

[50] 561 H.C. Deb. 288 (Mr. Sydney Silverman) and 297 (Mr. Leslie Hale).

[1] (1956) 40 Cr.App.R. 152.

"I am clearly of the opinion, and so is my brother Rolfe, that where a wound is given, which in the judgment of competent medical advisers is dangerous, and treatment which they bona fide adopt is the immediate cause of death, the party who inflicted the wound is criminally responsible. . . ." It is true that he later made a reference to the operation being "skilfully performed," but it seems clear that he was referring to the qualification that the operation should be performed by competent surgeons. Indeed at the conclusion of his judgment he said: "To admit this question would be to raise a collateral issue in every case as to the degree of skill which the medical men possessed." It is this principle which has been shaken by the judgment of the Court of Criminal Appeal in *Jordan*. The learned judge in *Pym* agreed to reserve points for the judges on questions whether the medical opinion was wrong, whether the wound would have inevitably caused death, and whether the operation was necessary—"although as I have already stated, I have no doubt upon the matter"—meaning that such evidence could not be admitted. However the jury acquitted the prisoner and the questions did not come before the judges. Erle J. was considering a case where death has resulted from a surgical operation following a gunshot wound received in a duel, *i.e.*, a case of constructive homicide (see [1957] Crim.L.R. 516). The principle should therefore have applied with even more weight to a charge of homicide accompanied by the requisite *mens rea*, as was the case in *Jordan*. Shortly after *Pym* was decided another party to the same duel was indicted before Platt B.[3] and fresh medical evidence produced on behalf of the defence. The learned Baron refused to accept it "as he expressed his own strong opinion that a party under such circumstances would be indictable for murder, and that the wound might properly be laid as the cause of death." He reluctantly agreed to reserve the points for the judges ". . . but mainly because Erle J. had reserved them. . . ." However the jury again acquitted and the question once again failed to reach the judges.

Cases following Pym's case

The following year in *McIntyre*,[4] a man was indicted for the murder of his wife by kicking her. The medical evidence stated that the kicks "caused general shock to the system and great loss of blood." However the surgeon called to attend her had given her some brandy, apparently while she was in an insensible state, and had conceded that some of it might have gone down the wrong way. The case was concerned primarily with the technicality of the giving of the brandy, which was a possible cause of death, not being included in the indictment. Coleridge J., however, made some useful observations on the principle under consideration:—"There is no doubt whatever that if a person had received a small wound and the surgeon administered a poisonous salve, it could not be said that the party giving the wound occasioned death by the wound or by the salve. That is very unlike the case where the person has received a mortal wound, and dies in consequence of his constitution, or from being very drunk, or from not having medical advice, or from having been injudiciously treated. There the person who gave the mortal wound is the cause of death, though it comes on sooner than it otherwise would. . . . The question is—Are you of the opinion that she received mortal injuries before the surgeon was called in? If you are of the opinion there was no mortal injury before, then you will find the prisoner guilty of assault only. . . ."[5] The accused was found guilty of manslaughter. At this point it is convenient to consider the judgment of Wightman J. in *Clark and Bag*,[6] a case which antedates by a few years those which have already been considered. He directed a jury "that if they were of opinion that the deceased did not die of the wounds he had received, but from the bad medical treatment, that the prisoners would not be guilty of even the offence of manslaughter, and if so, they might acquit of the felony, and find a verdict for assault." This is a good illustration of what Avory J. (as he then was) described as "the well known principle that judgments must be read according to the subject-matter of the cases to which they belong. . . ."[7] The victim had been assaulted by the accused in a public-house, knocked down, and "given many severe blows." The surgeon called to treat the case stated that he found the victim to be suffering from *delirium tremens* which was undoubtedly brought on by the assault, and was the cause of death. However, the surgeon had immediately bled the victim of 16 ounces of blood, and had repeated the operation the next day, following which death occurred. Another surgeon gave evidence before the court and stated: "that to bleed a person suffering under such a disease was most improper, he thanked God he had never done so, that it would most probably cause the death of a patient, and that he had never known an instance in which such a course of treatment had not been followed by fatal results." This witness, who had examined the body after death, confirmed that the cause of death was *delirium tremens*, but stated that none of the injuries was of a very serious character. Furthermore, even the attending surgeon had admitted in cross-examination "that none of the blows which the deceased had received was of a character to be directly dangerous to life."

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[2] (1846) 1 Cox C.C. 339; 6 L.T.(o.s.) 506.

[3] *Hawkey* (1846) 7 L.T.(o.s.) 370.

[4] (1847) 2 Cox C.C. 379.

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[5] *Ibid.*, at p. 380.

[6] (1842) 6 J.P. 508.

[7] *Osbourne* (1922) 153 L.T.J. 244.

Up to this point the decided cases had established the principle that the defence cannot impeach the quality of medical treatment bona fide adopted by competent medical men where death follows a wound which is dangerous to life. This principle was further strengthened by *Davis and Wagstaffe*.[8] The victim had received a compound fracture of the lower jaw, from which he bled profusely, and bruising of the throat "as if from a kick." He was known to be of intemperate habits. An operation was planned to wire his jaw, and death followed the administration of chloroform. It seems that the wounds received were not dangerous to life, and the medical evidence stated if the jaw had not been wired, it would have united regularly. In fact the learned judge stated [9] "It is not disputed that if chloroform had not been administered the man would not have died." Wiring of fractures of the jaw is usually carried out in these cases in order to expedite union, and to ensure exact alignment of the broken ends for dental and cosmetic purposes. Post-mortem examination showed that the deceased had bilateral pulmonary tuberculosis and a fatty liver, both heavy contraindications to the administration of chloroform. The latter should have been suspected from the victim's known intemperate habits, the former could have been elicited by a simple examination of his chest, such as should have been carried out, even in 1883, at some stage of the medical treatment of a case of this nature. Indeed, an astute juror inquired at the trial [10] "whether it was not usual to examine a person as to his general condition before chloroform was administered." However, the medical witness said it was not usual to examine the heart and lungs as "they could tell by the general appearance of the patient." The anaesthetist concerned, described as the Senior Assistant Chloroformist, confirmed that he had not made an examination of the victim. Matthew J., however, refused to consider this point and stated[11] "For it would never do to have a serious injury by one man on another and have the issue raised that death was due to want of skill on the part of the medical men." The principle enunciated by Erle J. in *Pym* (*supra*) had now been accepted beyond a shadow of doubt; indeed, the learned judge said[12]: "I have no doubt upon the matter, nor has my brother Field whom I have consulted; and we think, whatever may have been the case in 1846, the law is now too clear to reserve a case for the consideration of the judges. . . . We both think that the chloroform having been properly administered by a regular medical practitioner, the fact that death resulted from its use cannot affect the criminal responsibility of the accused persons."[13] The principle is further strengthened by the fact that he made it quite clear that his remarks applied even though the accused might have intended to do no more than to assault the victim.

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[8] (1883) 15 Cox C.C. 174.

[9] *Ibid.*, at p. 178.

[10] *Ibid.*, at p. 177.

Since 1883 little assistance is to be gained from the reported cases on the principle in question. It is interesting to note that the case law was given close consideration in the Canadian appeal case *Burgess and McKenzie*.[14] *Pym, McIntyre* and *Davis and Wagstaffe* were considered in relation to section 258 of the Criminal Code of Canada which McPhillips J. described as "really an enactment in conformity with the decided cases, and particularly those above cited."[15] Section 258 provides that: "Everyone who causes a bodily injury, which is of itself of a dangerous nature to any person, from which death results, kills that person, although the immediate cause of death be treatment, proper or improper, applied in good faith."

Jordan's case

This survey of the existing case law forms a useful background to the consideration of *Jordan*. Jordan, a coloured American, drove his knife into the abdomen of Beaumont, a man aged 27. On admission to hospital Beaumont was unconscious, and 12 inches of small intestine were protruding out of his abdomen through a stab wound one inch in length in the abdominal wall. Jordan's knife had perforated the intestine in two places. Beaumont died eight days after admission to hospital, and, according to the evidence of the pathologist who conducted the post-mortem examination: "the cause of death was broncho-pneumonia following penetrating abdominal injury."[16] Under cross-examination the pathologist agreed that it was reasonable to suppose that Beaumont might not have died if pneumonia had not supervened. The Surgical Registrar who attended Beaumont in hospital stated that his condition was satisfactory for a few days after admission, but later deteriorated rapidly. However, he emphasised that Beaumont's condition had been critical from the time he was admitted to hospital. Byrne J. directed the jury that death was "consequent upon the wound inflicted" and "it did not occur to the prosecution, the defence, the judge or the jury that there could be any doubt but that the stab caused death."[17] Jordan was convicted of murder and sentenced to death.

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[11] *Ibid.*, at p. 179.
[12] *Ibid.*, at p. 178.
[13] *Ibid.*, at p. 179.
[14] [1928] 2 D.L.R. 694.
[15] *Ibid.*, at p. 701.

Before considering the events in the Court of Criminal Appeal, it may be helpful to discuss briefly the medical implications of a wound such as the victim had received in this case. If death does not occur immediately from shock and haemorrhage, as when a large blood vessel has been severed by the knife, it will almost certainly supervene in a few days unless drastic surgical and medical resuscitative measures are immediately adopted. But even under optimal conditions the wound remains highly dangerous to life. The usual sequence of events is peritonitis owing to spilling of the intestinal contents or contamination of the peritoneum by the wounding; paralysis of the gut, which may occur even in the absence of infection; and dehydration which will lead to death. Essentials of treatment include stitching up the gut and returning it to the abdomen, together with exploration to ascertain the full extent of the damage; keeping the gut empty by gastric suction and feeding the victim by intravenous fluids until the gut has had time to heal; attacking the infection with antibiotics; and combating the dehydration (which is often severe) with intravenous solutions under careful biochemical control. The victim had the benefit of all these measures and at post-mortem the gut was found almost completely healed. However, any one of a number of complications may follow a serious wound of this nature, and it is easy to see that complications may themselves result from the dramatic measures which have been instituted to save the victim's life. If death is the immediate result of such a complication it is logical to infer that the medical treatment has "caused" the death and not the stab wound. Such reasoning, of course, does not take into consideration the fact that the medical treatment has already kept the victim alive for longer than would otherwise have been the case.

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[16] (1956) 40 Cr.App.R. 152. See also [1956] Journal of Criminal Law 357.

[17] (1956) 40 Cr.App.R., at p. 155.

Following Jordan's conviction, application was made to the Court of Criminal Appeal for leave to call additional medical evidence. Two doctors were called who "stated that in their opinion death had not been caused by the stab wound, but by the introduction of terramycin after the deceased man had shown he was intolerant to it and by the intravenous introduction of abnormal quantities of liquid."[18] It is most unfortunate that medical evidence should be allowed to state whether death is "caused" by an event, as this is a question for the court to decide and not for expert evidence. The expert evidence in this case sought to prove that there was no direct connection, in the medical sense, between the stab wound and the terminal event leading to death, *i.e.*, pneumonia, and that the treatment concerned was incorrect. But this is completely different from the question whether the stab wound "caused" the death, and as we have seen, the authorities were unanimous that in these circumstances the stab wound must be held to have caused the death, even if the treatment which led directly to death happened to have been incorrect. The questions for expert evidence to answer in these cases had been: first, Was the wound dangerous to life? and second, Was the treatment adopted bona fide by competent medical advisers? As we have seen, if these two questions were answered in the affirmative (and there could be little doubt about this in *Jordan*), it was not legally relevant to inquire whether the death was the direct result of the treatment or the wound, nor was it relevant to impeach the quality of the treatment.

"*Normal*" *treatment*

The extent to which the Court of Criminal Appeal was prepared to depart from the authorities can be seen from the following extract from its judgment: "We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury, but we do not think it necessary to examine the cases in detail or to formulate for the assistance of those who have to deal with such matters in the future the correct test which ought to be laid down with regard to what is necessary to be proved in order to establish a causal connection between the death and the felonious injury. It is sufficient to point out here that this was not normal treatment."[19] But however anxious the court may have been not to establish a rule of law on the point, it is clear that if the victim of a homicidal assault dies as a direct result of medical treatment instituted to save his life, it will not in future be considered homicide if the treatment can be shown to be "not normal." This will be so even though a wound has been given which was dangerous to life, and the treatment has been adopted bona fide by competent medical attendants. Unfortunately the court did not explain what is meant by "normal" treatment. The measures instituted in this case were absolutely correct in principle, the only matters in dispute were the amount of intravenous fluids administered, and the repeated administration of terramycin. Both these measures were adopted for the purpose of saving a life which had been placed in danger by the stab wound, but the court was satisfied that the way in which they were carried out was incorrect.

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[18] *Ibid.*, p. 153.
[19] *Ibid.*, p. 157.

It may be doubted whether this requirement that treatment must have been "normal" is in the best interests. The treatment of wounds as dangerous as this is, not unexpectedly, fraught with hazards. Sudden complications may occur requiring immediate action in order to save life, and it may happen that the course which was taken will afterwards be shown to have been incorrect, even though the treatment has been in the hands of most expert medical attendants. It is difficult to see what justification there can be for impeaching the medical treatment in these cases as the victim would have died in any case if treatment had not been given, and may, as in *Jordan*, already have been kept alive longer than would otherwise have been the case. It would, indeed, be unfortunate if surgeons and other medical attendants, fighting for the life of a victim of a homicidal assault, should be deterred from taking some dramatic step in treatment to meet some unexpected emergency for fear that the treatment in question will afterwards be impeached as being "not normal."[20] The repeated emphasis placed on the undesirability of impeaching the quality of the medical treatment in previous cases may have been inspired by similar considerations.

Not unexpectedly the decision of the Court of Criminal Appeal in *Jordan* has given rise to some concern in the medical profession. The court based its decision on the evidence of two medical witnesses whose standing is beyond question. But neither witness was present at any stage in the treatment of the case. The criticism of the repeated administration of terramycin amounted to no more than a generalisation that this drug should normally be withdrawn in the presence of certain reactions. But many patients develop " upsets " when given antibiotics without necessarily being sensitive to the drug concerned. It is impossible to generalise on this question as every case must be treated on its merits by the doctors in actual attendance on the patient. This is one of the first principles of clinical medicine. Terramycin is an antibiotic with an exceptionally wide range of activity against bacteria and its repeated administration was probably justified at the time when the patient's condition had become desperate. The same may be said of the criticism of the amount of intravenous fluids given in this case. Exceptionally large quantities of fluid were essential to combat the severe dehydration associated with the acute gastro-enteritis which the victim had developed. Providing the electrolyte balance of the body fluids is maintained it is difficult to see why the administration of such large quantities should be " palpably wrong."[21] Cases of gastro-enteritis have been recorded in which far greater quantities of fluids have been necessary and the patients have recovered. It is true that it is not usual medical practice in England to have two " drips " (intravenous infusions) set up on the patient at the same time, but this was an exceptional case requiring exceptional measures. Furthermore, it is recognised practice in the United States to administer fluids concurrently at more than one site in these cases. In view of these considerations it is not surprising that a Board of Inquiry set up by the Regional Hospital Board as a result of the proceedings in the Court of Criminal Appeal could find nothing wrong with the medical treatment of the victim.

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[20] Dr. Glanville Williams has now stated that a mistake in medical treatment will not interrupt the chain of causation unless it is a negligent mistake. (*The Listener*, July 11, pp. 63-65.) If this is the case, it is unfortunate that the judgment of the Court of Criminal Appeal does not explain the matter more clearly, as treatment which is "not normal" is not necessarily negligent. In fact, although the court referred to the treatment as "wrong," there is no mention in the judgment of negligence. This qualification will do little to relieve the doubts of the medical profession.

It is reasonable to suppose that a jury would have acquitted on the additional medical evidence as given before the Court of Criminal Appeal. The judge, bound by the existing authorities, would have directed the jury that the evidence was irrelevant in the circumstances of the case, but juries have been notoriously prone to acquit in this type of case notwithstanding the judge's direction. Even so, there has been no officially reported case in which a jury has failed to convict on such a direction when the assault has been accompanied by the requisite *mens rea*. *Pym* and *Hawkey* were, it will be remembered, cases of constructive homicide, as was *Davis and Wagstaffe*, a case which was further complicated by the fact that there had been a mêlée and it was not clear who had struck the fatal blow. No such inhibitions would have influenced the jury in *Jordan* as there can be little doubt that the accused was at least reckless as to the consequence of death when he plunged his knife into the victim's abdomen. Furthermore, it cannot be believed that the prosecution would have allowed the additional evidence to appear as favourable to the accused as in the Court of Criminal Appeal.[22] Competent cross-examination could hardly have failed to reduce much of its effect.

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[21] (1956) 40 Cr.App.R., at p. 158.

It is unfortunate that the failure of the prosecution or the defence to produce the full facts of the case at the trial should have resulted in this important pronouncement on the substantive law of homicide by the Court of Criminal Appeal. In future when victims of homicidal assaults survive long enough to receive hospital treatment it may well become a routine of the defence to impeach the medical treatment in order to show that the treatment was " not normal." There must be a strong body of opinion to agree with the old authorities that the point is legally irrelevant providing a wound has been given which is dangerous to life and the treatment has been adopted bona fide by competent medical attendants. The consequence of this change in the substantive law of homicide may be greater than has been appreciated. In particular, the courts may find themselves involved in protracted, undesirable, and, it is respectfully submitted, unnecessary investigations into the medical treatment of victims of homicidal assaults.

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[22] Hence Dr. Glanville Williams (*loc. cit.*) suggests that advance notice of the nature of the defence should be given to the prosecution, corresponding with the general practice in Continental countries. It should not be overlooked, however, that in cases of homicide the full post-mortem report is available to either side (Coroners Rules, 1953, r. 39). Hence, certain facts which do not appear to have been appreciated at the trial, such as the fact that the wound in the gut was almost completely healed when death occurred, could easily have been ascertained.

How to run a Lottery

By P. K. L. Danks

Definition of a Lottery

The first thing for promotors of lotteries to decide is whether or not the proposed scheme is, in fact, a lottery. No statute defines a lottery, but the following conclusions can be drawn from the not inconsiderable case law on the subject.

A lottery is a distribution of prizes by lot or chance.[1] There is no magic in the word " distribution "; " payment " will do just as well. There is no magic in the word " prizes "; " commission " or " reward " will do equally as well.[2] A lottery may exist from whatever source the prizes come,[3] but a free, absolutely gratuitous distribution of chances, none of which has been paid for, would not be a lottery.[4] To constitute a lottery it must be a matter depending entirely on chance [5]; if merit or skill plays any part in determining the distribution there has been no lottery.[6] The merit or skill must be real skill, something more than a scintilla of skill, which has some effect.[7]

The Illegality of Lotteries

The Betting and Lotteries Act, 1934,[8] repealed all other Acts (except the Art Unions Act, 1846,[9] which it amended) relating to lotteries in Great Britain (*i.e.*, none of the following applies to Northern Ireland) and enacted that subject to the provisions of Part II of the Act, *i.e.*, sections 21 to 28, all lotteries are unlawful.

Sections 1 and 4 of the Small Lotteries and Gaming Act, 1956,[10] are stated to have effect as if they were included in Part II of the 1934 Act after section 22.

It follows that five types of lottery are exempt from the general prohibition, *viz.*:—

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[1] Hawkins J. in *Taylor* v. *Smetten* (1883) 11 Q.B.D. 207.
[2] Lord Hewart C.J. in *D. P. P.* v. *Phillips* [1935] 1 K.B. 391.
[3] Ridley J. in *Bartlett* v. *Parker* [1912] 2 K.B. 497.
[4] Darling J. in *Willis* v. *Young and Stembridge* [1907] 1 K.B. 448.
[5] Smith L.J. in *Hall* v. *Cox* [1899] 1 Q.B. 198.
[6] Lush J. in *Scott* v. *D. P. P.* [1914] 2 K.B. 868.
[7] Humphreys J. in *Moore* v. *Elphick* (1945) 110 J.P. 66.
[8] 24 & 25 Geo. 5, c. 58.
[9] 9 & 10 Vict. c. 48.
[10] 4 & 5 Eliz. 2, c. 45.

(i) Small lotteries incidental to certain entertainments[11];

(ii) Small gaming parties[12];

(iii) Private lotteries[13];

(iv) Art Union lotteries[14];

(v) Small lotteries conducted for charitable, sporting or other purposes.[15]

Which Act to comply with

To be lawful, therefore, a lottery has to comply with either the 1846, 1934 or 1956 Act. These three Acts are mutually exclusive. So long as the lottery is made lawful by one of the Acts, the others can be ignored. Of the two more recent Acts, the 1956 Act has undoubtedly the more formidable conditions, and promoters in considering the way in which to run their proposed lottery would be well advised first to try to bring the lottery within the 1934 Act, and failing this, fall back on the 1956 Act.

Lotteries fall conveniently into two groups. First, those in connection with an entertainment of some sort, and secondly, those run for a group of people. When considering lotteries in the first category the promoter should consider the following:—

(1) Is the proposed lottery a small one incidental to a certain entertainment as envisaged by section 23 (1) of the 1934 Act? If it is, well and good. The promoter need only comply with simple conditions. If it is not within that section, then

(2) Is it a small gaming party as envisaged by section 4 of the 1956 Act? If it is, then once again it is only necessary to comply with the conditions. If it is not within that section, see (3) below.

When considering proposed lotteries in the second category (*i.e.*, those run for a group of people) the following should be considered:—

(1) Is the proposed lottery a private one covered by section 24 of the 1934 Act? If it is, then comply with the conditions laid down. If it is not within that section, then

(2) Is it an Art Union lottery covered by the 1846 Act? If it is, then it is lawful, but if it is not within that Act, then

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[11] 1934 Act, s. 23.
[12] 1956 Act, s. 4.
[13] 1934 Act, s. 24.
[14] 1934 Act, s. 25.
[15] 1956 Act, s. 1.

(3) The lottery must be promoted in accordance with section 1 of the 1956 Act.

If promoters follow the programme outlined here they will find that the cumbersome 1956 Act procedure need only be followed as a last resort.

Lotteries Promoted in connection with an Entertainment

1. *Small lotteries*

Small lotteries, which are incidental to bazaars, sales of work, fêtes and other entertainments of a similar character, whether limited to one day or not, or extending over two or more days,[16] are exempt from the general prohibition of lotteries.[17] The following conditions in connection with the promotion and conduct of such lotteries must be observed [18]:—

(1) *Proceeds.* The whole proceeds of the entertainment (including the proceeds of the lottery but less expenses) must be devoted to purposes other than private gain.[19]

(2) *Expenses.* The only expenses which may be deducted from the proceeds are:—

(a) those of the entertainment excluding expenses incurred in connection with the lottery [20]

(b) those incurred in printing tickets in the lottery [21]

(c) such sum (if any) not exceeding £10 as the promoter thinks fit to appropriate on account of purchasing prizes in the lottery.[22]

(3) *Prizes.* None may be money prizes, and see (2) (c) above.[23]

(4) *Tickets.* Must not be sold or issued (nor may the result be declared) except on the premises on which the entertainment takes place and during its progress.[24]

(5) *Proviso.* The facilities afforded for participating in lotteries may not be the only, or the only substantial, inducement to persons to attend the entertainment.[25]

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[16] s. 23 (3) of the 1934 Act.

[17] s. 23 (1) of the 1934 Act.

[18] s. 23 (2) of the 1934 Act.

[19] s. 23 (2) (*a*) of the 1934 Act.

[20] s. 23 (2) (*a*) (i) of the 1934 Act.

[21] s. 23 (2) (*a*) (ii) of the 1934 Act.

[22] s. 23 (2) (*a*) (iii) of the 1934 Act.

[23] s. 23 (2) (*b*) of the 1934 Act.

[24] s. 23 (2) (*c*) of the 1934 Act.

[25] s. 23 (2) (*d*) of the 1934 Act.

2. *Small gaming parties*

By section 4 of the 1956 Act a game of chance, or chance and skill played at an entertainment promoted in Great Britain for raising money to be applied for purposes other than private gain, subject to the following conditions [26] shall not be deemed to be an unlawful lottery [27]: —

(1) *Proceeds.* The proceeds after deducting expenses and cost of prizes must be applied for purposes other than purposes of private gain.[28]

(2) *Expenses.* Must not exceed the reasonable cost of the facilities provided for the purposes of the games.[29]

(3) *Prizes.*

- (a) Not more than one distribution of prizes may be made in respect of all games played at the entertainment.[30]
- (b) The total value not to exceed £20 in respect of all such games.[29]

(4) *Tickets.* Not more than one payment (as entrance fee, stake or otherwise) not exceeding 5s. to be made by each player, in respect of all games played at the entertainment.[31]

(5) *Provisos.*

- (a) Where two or more entertainments are promoted on the same premises by the same persons on any day, the above four conditions apply in relation to those entertainments as if they were a single entertainment.[32]
- (b) It is enacted that except as provided in the foregoing sub-paragraph the conditions specified in paragraphs (1) to (4) above shall apply separately to each entertainment which forms part of a series of entertainments, whether or not some or all of the persons taking part in any one of the series are thereby qualified to take part in the other. Where each of the persons taking part in the games played at the final entertainment of such a series is qualified to do so by reason of his having taken part in the games played at another entertainment of that series, held on a previous day (being an entertainment

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[26] s. 4 (1) of the 1956 Act.
[27] s. 4 (3) of the 1956 Act.
[28] s. 4 (1) (*c*) of the 1956 Act.
[29] s. 4 (1) (*d*) of the 1956 Act.
[30] s. 4 (1) (*b*) of the 1956 Act.
[31] s. 4 (3) (*a*) of the 1956 Act.
[32] s. 4 (4) of the 1956 Act.

to which section 4 of the 1956 Act applies) then the total value of the prizes distributed in respect of such games must not exceed £100.[33]

3. *Private lotteries*

For the purposes of section 24 of the 1934 Act a private lottery means a lottery which is promoted for, and in which the sale of tickets or chances by the promoter is confined to, either:—

(a) members of one society established and conducted for purposes not connected with gaming, wagering or lotteries; or
(b) persons all of whom work on the same premises; or
(c) persons all of whom reside on the same premises

and which is promoted by persons each of whom is a person to whom, under the foregoing provisions, tickets or chances may be sold by the promoter and, in the case of a lottery promoted for the members of a society, is a person authorised in writing by the governing body of the society to promote the lottery.

There is no difficulty with regard to lotteries promoted under (b) or (c) above, but those under (a) above have run into snags. The Act defines a "society" as including a club, institution, organisation or other association of persons by whatever name called, and each local or affiliated branch or section of a society is to be regarded as a separate and distinct society.[34]

In *Keehan* v. *Walters* [35] a lottery was organised by the London District of the Communist Party, a society not established and conducted for purposes of gaming, wagering or lotteries. The society was broken up into a number of local branches and sections which the court held to be "societies" within section 24 (1), but the society itself was not such a "society." The result therefore was that a lottery promoted for, and confined to the members of the whole society was not a private lottery and was therefore unlawful.

In *Hudson* v. *Chamberlain,*[36] an officer of the National Cyclists' Union invited certain local centres affiliated to the Union to take part in a lottery and distributed tickets to them. Lord Goddard C.J. held that the Union was divided into a number of centres and that the centres were local branches or sections each of which was, for the purpose of section 24, to be regarded as a separate and distinct "society." In *Keehan's* case McNaghten J. had said:—"I am of opinion that the society contemplated is a small local body, and not one extending over the whole kingdom." Lord Goddard C.J. took the opportunity of criticising the remarks of McNaghten J. by saying:—" I think McNaghten J.'s judgment went too far . . . if there is an institution . . . it is perfectly possible . . . to run a private lottery confined to its own members, although such members may live in every county in England."

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[33] s. 4 (5) of the 1956 Act.
[34] s. 24 (1) of the 1934 Act.
[35] [1948] 1 K.B. 19.
[36] (1948) 113 J.P. 64.

A different point was taken in *Maynard* v. *Williams*,[37] where the argument was as to whether or not a society was established and conducted for purposes connected with gaming, wagering or lotteries. The facts were that Torquay United Football Club was a professional club and 30 years ago a Torquay United Supporters' Club was formed, the aim and object being the welfare of the Football Club. For this purpose funds were obtained for use as the executive committee might direct. Membership was open to all for 1s. and the Club had over 7,000 members. In furtherance of its aims the Club held dances, whist drives, jumble sales, darts and skittles matches, all primarily aimed at raising money. Voluntary services were performed at home matches and voluntary labour improved the amenities of the ground. Transport arrangements for away matches were organised. Money was raised by means of lotteries. The Club itself ran at a loss but the proceeds of the lotteries was £90 per week which was handed to the Football Club. In his judgment, Lord Goddard C.J. said: " What is the object . . . of the promoters of the lottery? It is to raise money. Their business, or part of their business is to raise money for the purpose of handing that money over to the Football Club. If that is part of their business, as it clearly is . . . the fact that they are raising money by means of lotteries seems to me to show that this society is conducted for purposes connected with a lottery. . . . These are weekly lotteries held to provide a weekly sum of money, and if that is not conducting a business in connection with lotteries, I find great difficulty in understanding what would be."

Cassels J. in his judgment, whilst agreeing with the decision of Lord Goddard, thought rather differently. " Where Parliament uses two words," he said, " as here, 'established' and 'conducted,' I think Parliament intended to convey two separate meanings. A society may be established for one purpose and conducted for another. This society was established to help the Football Club financially. It was conducted for a purpose connected with lotteries. I think frequency is an important feature . . . if the respondents are within the law then a society formed for any purpose, political, social or otherwise, provided it is not an illegal purpose, can have supporters' clubs to collect funds for it, and that supporters' clubs can conduct weekly lotteries along with some dances and whist drives. If that be so, then there is nothing to prevent such a club from running a gaming or wagering establishment as well as handing over the proceeds, and section 24 (1) becomes a nullity." In a long dissenting judgment, Devlin J. thought " the question is not whether the society conducts lotteries, nor even whether it conducts a business consisting largely of lotteries, but whether its affairs are so conducted that the untainted purposes for which it was established have either been overthrown or joined by a tainted purpose. Of course, in one sense every time the club holds a lottery it might be said to be conducting itself for the purpose of holding a lottery. If this were the right test of purpose, it would make nonsense of the definition, for it would be impossible to hold a lottery and remain within it."

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[37] [1955] 1 W.L.R. 54. But see 1956 Act, s. 1, which authorises lotteries of the type here held to be unlawful provided the requirements of section 1 are complied with. *Post*, p. 595.

The same court heard *Pearse* v. *Hart,*[38] which was a similar supporters' club case. When the club was formed in 1949 it had 1,000 members, after it started running a lottery the membership rose to 12,500. Lord Goddard C.J. and Cassels J. did not alter their opinion, and on this occasion Devlin J. had no hesitation in agreeing with them.

Private lotteries under the 1934 Act are deemed not to be unlawful,[39] but the following provisions must be complied with:—

(1) *Promoter.*
- (a) Must be a person to whom tickets may be sold,[40]
- (b) If the lottery is promoted for members of a society he must be authorised in writing by the governing body of the society to promote the lottery.[40]

(2) *Proceeds.*

The whole, after deducting expenses incurred for printing and stationery, must be devoted to:
- (a) the provision of prizes for purchasers of tickets; or
- (b) in the case of a lottery promoted for members of a society either
    - (i) to the provision of prizes for purchasers of tickets; or
    - (ii) to purposes which are purposes of the the society; or

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[38] [1955] 1 W.L.R. 67n.

[39] s. 24 (2) of the 1934 Act.

[40] s. 24 (1) of the 1934 Act.

(iii) part as to the provision of prizes and the remainder to the purposes of the society.[41]

(3) *Expenses.* For printing and stationery only.[41]

(4) *Prizes.*

No prize may be paid or delivered except to the person to whom the winning ticket was sold by the promoter.[42]

(5) *Tickets.*

- (a) The sale must be confined to either:—
  - (i) members of one society established and conducted for purposes not connected with gaming, wagering or lotteries[43]; or
  - (ii) persons all of whom work on the same premises[44]; or
  - (iii) persons all of whom reside on the same premises.[45]
- (b) All must be the same price, which must be stated on the ticket.[46]
- (c) None may be sent through the post.[47]
- (d) None may be issued or allotted by the promoter except by way of sale and upon receipt of the full price thereof, and any money or valuable thing received as payment may in no circumstances be returned.[48]
- (e) All must bear on the face of them
  - (i) the name and address of each of the promoters[49];
  - (ii) a statement of the persons to whom the sale of them by the promoters is restricted[49];
  - (iii) a statement that no prize won in the lottery will be paid or delivered by the promoters to any person other than the person to whom the winning one was sold by them.[49]

(6) *Advertisements.* None may be exhibited, published or distributed except:

- (a) on the premises of the society for whose members it is promoted, or as the case may be, on the premises on which persons for whom it is promoted work or reside.[50]

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[41] s. 24 (2) (*a*) of the 1934 Act.
[42] s. 24 (2) (*d*) of the 1934 Act.
[43] s. 24 (1) (*a*) of the 1934 Act.
[44] s. 24 (1) (*b*) of the 1934 Act.
[45] s. 24 (1) (*c*) of the 1934 Act.
[46] s. 24 (2) (*c*) of the 1934 Act.
[47] s. 24 (2) (*f*) of the 1934 Act.
[48] s. 24 (2) (*e*) of the 1934 Act.
[49] s. 24 (2) (*d*) of the 1934 Act.

(b) Such as may be contained in the tickets (if any).[50]

4. *Art Union lotteries*

The Art Unions Act of 1846[51] as amended by the 1934 Act[52] exempts from the general prohibition of lotteries all voluntary associations of persons formed for either of the following purposes, so long as their proceedings are carried on in good faith for the encouragement of fine arts:—

(a) the purchase of paintings, drawings or other works of art to be afterwards allotted and distributed by chance or otherwise among the members forming part of such association; or

(b) raising sums of money by subscription or contribution to be allotted and distributed by chance or otherwise, as prizes amongst the members, subscribers or contributors forming part of such association, on condition that such sums of money so allotted and distributed are expended solely and entirely in the purchase of paintings, drawings or other works of art.

Before such a lottery is held the association must first obtain for its incorporation a Royal Charter, or the deed of partnership or other instrument constituting such association, and its rules and regulations must be submitted to and approved by a committee of the Privy Council, and a copy thereof deposited with such committee.[53]

Her Majesty can revoke or annul the charter, deed or other instrument under which an Art Union has been constituted upon the recommendation of the President of the Board of Trade that it is desirable for Her Majesty to do so.[53]

In the case of an Art Union constituted under a deed or other instrument not being a charter, the power of annulment may be exercised also by the President of the Board of Trade or, in his absence, by a Secretary of State if, in the opinion of the President or Secretary as the case may be, it is expedient, having regard to the circumstances, that immediate action be taken.[54]

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[50] s. 24 (2) (*b*) of the 1934 Act.
[51] 9 & 10 Vict. c. 48.
[52] s. 25 of the 1934 Act.
[53] s. 25 (1) of the 1934 Act.
[54] s. 25 (2) of the 1934 Act.

5. *Small lotteries conducted for charitable, sporting and other purposes*

The provisions of section 1 of the 1956 Act apply to any lottery not deemed unlawful by any other enactment, which is promoted on behalf of a society, registered by the local authority under the Act, being a society established and conducted wholly or mainly for one or more of the following purposes:—

(a) charitable purposes;

(b) participation in or support of athletic games or games or cultural activities;

(c) purposes not described in (a) or (b), not being purposes of private gain or of any commercial undertaking;

and is so promoted for raising money to be applied for purposes of the society.[55]

"Society" includes a club, institution, organisation, or association of persons, by whatever name called, and any separate branch or section of such a club, institution, organisation or association.[56]

"Local authority," means, in London, the Common Council of the City of London or the Council of a Metropolitan borough, in the rest of England and Wales the council of a county borough, or county district and in Scotland a county or town council.[57]

Registration. A society wishing to promote a lottery under the 1956 Act,

(1) must apply for registration to the local authority in whose area its office or head office is situated.[58] If a society has branches, it is possible either:—

(a) for the headquarters of the society to register and for lotteries to be promoted on behalf of the society[58]; or

(b) for branches to register with the local authority in whose areas the branch offices are situated and for lotteries to be promoted on behalf of the branches thus registered[58];

(2) must specify in its application the purposes for which the society is established and conducted[58];

(3) must pay £1 registration fee[58];

(4) may apply, once registered, at any time for the cancellation of the registration[59];

(5) must pay, whilst registered, on January 1 annually, a further registration fee of £1 to the local authority.[60]

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[55] s. 1 (1) of the 1956 Act.
[56] s. 1 (4) of the 1956 Act.
[57] s. 2 (6) of the 1956 Act.
[58] s. 2 (1) of the 1956 Act.
[59] s. 2 (4) of the 1956 Act.
[60] s. 2 (5) of the 1956 Act.

The local authority receiving an application from a society:—

(6) must register the society in a register to be kept for the purpose,[58] and

(7) notify the society in writing that they have done so,[58] or

(8) after giving the society an oportunity of being heard, may refuse to register the society (or revoke a registration [61]) if it appears to the authority:—

(a) that a person has been convicted of an offence committed in connection with a lottery promoted or proposed to be promoted on behalf of the society, being an offence under the 1956 Act, or an offence committed after August 4, 1956, under section 22 of the 1934 Act (*e.g.*, selling tickets in an illegal lottery [61]); or

(b) that the society is not (or has ceased to be) a society on behalf of which lotteries may be promoted under the 1956 Act [61];

(9) an aggrieved society may appeal, in England and Wales, to Quarter Sessions or, in Scotland, to the Sheriff, from a refusal of registration, or revocation of registration. The appeal, in accordance with the provisions of the Quarter Sessions Act of 1849, is to the next practicable court of Quarter Sessions for the place in which is situate the head office or offices of the society, provided such Quarter Sessions are held not less than twenty-one clear days after the giving of notice of the refusal or revocation. Notice of appeal must be served on the local authority and the clerk of the peace, and sections 7 and 8 of the Summary Jurisdiction (Appeals) Act, 1933, will apply, as they apply in relation to an appeal from a court of summary jurisdiction. Where the local authority revokes a registration, then until the time within which notice of appeal may be given has expired (or if notice has been given then until the determination of the appeal) the registration is deemed to remain in force. If the court of Quarter Sessions confirm the decision of the local authority, the court may, if they think fit, order the registration to continue in force for a further period not exceeding two months from the date of the order [62];

(10) must cancel a registration when so requested by a society [59];

(11) can sue the society for a re-registration fee unpaid after January 1, annually, as a debt.[60]

Local authorities may consider it prudent to ensure that the address given is genuine and the society has, in fact, made the application. The police can say whether or not the society is "black" from the point of view of previous convictions. But this point does not seem to be of great importance as such a society has merely to change its name and form to become free from previous convictions. Since it is the duty of the police to prevent, as well as to detect, crime Chief Constables may wish to be informed of proposed registrations so that they can check on the genuineness of the application generally.

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[61] s. 2 (2) of the 1956 Act.

[62] s. 2 (3) of the 1956 Act, and ss. 1 (5) and 1 (6) of the Pool Betting Act, 1954.

Promoter—

(1) He must be a member of the society[63];

(2) He must be authorised in writing by the governing body of the society to act as such[63];

(3) No remuneration may be paid in respect of the lottery to the promoter or to any person employed by him in connection therewith who carries on a betting business or is otherwise engaged by way of business in the organisation of betting.[64]

A contributor to one legal journal has interpreted this as meaning that no remuneration shall be paid to the promoter. This seems too wide and the purpose, it may seem, is to prevent those in the betting business becoming professional promoters.

Proceeds.—The whole of the proceeds after deducting sums lawfully appropriated:—

(1) On account of expenses[65];

(2) For the provision of prizes[65];

(3) For the payment of pool betting duty (if any)[66];

must be applied to the purposes of the society which must be under one of the three permitted headings.[65]

Expenses—

(1) The amount of the proceeds appropriated on account of expenses must not exceed the expenses actually incurred, or 10 per cent. of the whole proceeds, whichever is the less[67];

(2) No payment on account of expenses can be made out of moneys of the society not being proceeds of the lottery[68];

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[63] s. 2 (*a*) of the 1956 Act.
[64] s. 2 (*b*) of the 1956 Act.
[65] s. 1 (2) (*d*) of the 1956 Act.
[66] s. 5 (3) of the 1956 Act.
[67] s. 1 (2) (*e*) of the 1956 Act.
[68] s. 1 (2) (*l*) of the 1956 Act.

(3) Pool betting duty is not deemed to be an expense to be included in the 10 per cent. referred to in (1) above.[66]

N.B.—In case of difficulty it might be permissible for the expenses or part of them to be paid by someone else, providing the payment is not from the proceeds of the lottery, *e.g.*, if a Supporters' Club promoted a lottery for a Football Club, and could not manage to keep within the 10 per cent. expenses permitted (since collecting agents are often paid 10 per cent. of what they collect, this may sometimes be the case) then the Football Club (if not otherwise prevented) although its financial assistance is the "purpose of the society" promoting the lottery, could help to defray the expenses out of money derived from a source other than the lottery.

Prizes—

(1) None may exceed £100.[69]
(2) Total amount may not exceed one-half of the proceeds.[67]
(3) No payment on account of prizes may be made out of moneys of the society not being proceeds of the lottery.[68]

Tickets—

(1) None to be sold at a price exceeding 1s.[69]
(2) The price of all must be the same (*i.e.*, no cut rates for sellers of tickets).[70]
(3) The price of the ticket must be stated on the ticket.[70]
(4) The total value sold must not exceed £750.[71]
(5) If the society promotes more than one lottery under the Act on any day, it may not sell a total of more than £750 worth of tickets in all the lotteries on that day.[71]
(6) They are deemed to be on sale on each day between the dates on which they are first and last sold, whether or not in fact one is sold on that day.[72]
(7) They may not be sent through the post except to members of the society.[73]
(8) No one can participate in a lottery except after full payment to the promoter of the whole price of one.[74]
(9) No money received by a promoter for or on account of one can in any circumstances be returned.[74]

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[69] s. 1 (2) (*c*) of the 1956 Act.
[70] s. 1 (2) (*f*) of the 1956 Act.
[71] s. 1 (2) (*g*) of the 1956 Act.
[72] s. 1 (5) of the 1956 Act.
[73] s. 1 (2) (*j*) of the 1956 Act.
[74] s. 1 (2) (*k*) of the 1956 Act.

(10) All must specify:—
  (a) The name of the society[75];
  (b) The name and address of the promoter[75];
  (c) The date on which the draw, determination or event by, or by reference to which, the prize winners will be ascertained will take place.[75]

(11) None to be sold by or to a person under sixteen years of age.[76]

Advertisements—

(1) None may be exhibited, published or distributed except:—
  (a) on the premises of the society[77]; or
  (b) distributed exclusively to members[77]; or
  (c) such as may be contained in the tickets (if any).[77]

(2) All shall specify:—
  (a) The name of the society[75];
  (b) The name and address of the promoter[75];
  (c) The date on which the draw, determination or event by, or by reference to which, the prize winners will be ascertained will take place.[75]

Pool Betting Duty. For the purposes of section 6 of the Finance (No. 2) Act, 1947 (which imposes pool betting duty), the expression " bet " does not include the taking of a ticket in a lottery promoted in accordance with the 1956 Act, and in case of which all the following conditions are observed[78]:—

(a) Promoter (3).

(b) Prizes (1).

(c) Tickets (1), (4) and (5).

Returns—

(A) *Duty of Promoter.*

(1) The promoter of a lottery under the 1956 Act must furnish certain information to the local authority with which the society is registered within three months after the month in which the winners of prizes in the lottery are ascertained[79]; in the case of a society which promotes frequent lotteries this enables returns to be made quarterly.

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[75] s. 1 (2) (*i*) of the 1956 Act.
[76] s. 1 (2) (*m*) of the 1956 Act.
[77] s. 1 (2) (*h*) of the 1956 Act.
[78] s. 5 (2) of the 1956 Act.
[79] s. 3 (1) of the 1956 Act.

(2) The return must be certified by two other members of the society, being persons of full age appointed in writing by the governing body of the society.[79]

(3) The return must show:—
- (i) the whole proceeds of the lottery [79];
- (ii) the sums appropriated out of the proceeds on account of expenses [79];
- (iii) the sums appropriated out of the proceeds on account of prizes [79];
- (iv) the particular purpose or purposes to which proceeds of the lottery were applied in accordance with the paragraph "*Proceeds*" above, and the amount applied for that purpose or for each of those purposes as the case may be [79];
- (v) the dates between which tickets in the lottery were sold.[79]

(B) *Duty of local authority.*

The local authority on receipt of a return from a promoter must keep the return for at least a year and during that period must keep it deposited at their office and permit any member of the public to inspect it during office hours free of charge.[80]

N.B.—Local authorities are not given power to prosecute on contravention of the conditions and need not look at the returns, but it would be convenient if they did scrutinise the returns and draw the attention of the police to any contraventions.

(*To be continued*)

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[80] s. 3 (2) of the 1956 Act.

Practice and Procedure

Magistrates' Courts

Beginning to try an indictable case dealt with summarily

Under the former summary jurisdiction law *R.* v. *Herts JJ.* [1911] 1 K.B. 612 was an authority for saying that magistrates had a complete discretion to commit for trial at any stage of the proceedings short of conviction, an indictable case in which they had assumed summary jurisdiction by consent of the accused. The Magistrates' Courts Act, 1952, changed the law as it had been interpreted in the Divisional Court, by enacting in section 24 that "a magistrates' court, having begun to try an information for any indictable offence, summarily, shall not thereafter proceed to inquire into the information as examining justices." The recent decision in *R.* v. *Craske, ex parte Commissioner of Police of the Metropolis* (*post,* p. 625) has established that a magistrates' court does not begin to try such an information when it takes a plea of not guilty from the defendant, so that, at that stage, he may be permitted to withdraw his consent to summary trial without contravening the provisions of section 24 (*supra*).

This decision was founded largely on the proposition that an accused person should not be deprived of his right to be tried by a jury unless the law clearly intended that consequence to follow inevitably from some incident in the proceedings. It is difficult, however, in cases not very far removed in their facts and merits from those appearing in *R.* v. *Craske* (*supra*) to reach a conclusion in accordance with this general proposition if any significance at all is to be attached to section 24 of the Act of 1952. An illustration of this was provided in a recent case in a Metropolitan Magistrates' Court where there had been a consent to summary trial and a plea of not guilty, followed by a remand after evidence of arrest only had been given. The defendant was not legally represented at the first hearing, but when he appeared on remand he was defended by counsel who sought on the authority of *R.* v. *Craske* (*supra*) to withdraw the consent to summary trial and have the case committed to sessions so that the defendant could have the verdict of a jury. The magistrate pointed out that the case cited did not appear to cover the one before him because he had begun to hear evidence. It was then suggested that this had been given merely to justify a remand in custody, and should not be regarded as a commencement of the trial. It was not suggested, however, that the evidence would have to be given over again as part of the trial; and the magistrate had no difficulty in deciding that he had heard it as part of the material on which his final adjudication would be based. He accordingly held that section 24 (above) precluded him from allowing the consent to summary trial to be withdrawn and proceeding to inquire into the charge as an examining justice. He offered the defence an adjournment to give an opportunity of obtaining a High Court ruling in the matter, but the offer was declined. The point remains, therefore, to some extent open though it would require a considerable enlargement of the scope of the decision in *R.* v. *Craske* (above) to overrule the Metropolitan Magistrate's view of his jurisdiction.

There is nothing in the Magistrates' Courts Act which requires a court to hear evidence before remanding an accused in custody. Many magistrates, however, regard it as a matter of good practice to learn something of the strength of the case against him before reaching a decision which will deprive him of his liberty for a period. It seems rather anomalous, to say the least of it, that a course adopted to safeguard the interests of a defendant may have the effect of prejudicing his interests so far as his right to be tried by a jury is concerned. Magistrates may, of course, when considering whether or not to grant bail, hear matters which are not evidence against the defendant on his trial; but when, in this connection, they hear part of the evidence against him it is difficult to argue that his trial has not begun.

Some sort of escape from these difficulties and anomalies is suggested by the judgment of Devlin J. in *R.* v. *Craske* (above). He based his concurrence in the decision of the court mainly on the consideration that the magistrate in question did not himself intend to inquire into the information as an examining justice, once he had allowed the accused to withdraw his consent to summary trial. The other two judgments did not refer to this argument and it must be admitted that it so considerably restricts the effect of section 24 of the Magistrates' Courts Act that it is not easy to see why the provision was enacted. If its obviously intended results can be avoided merely by adjourning a case to a differently constituted bench, the administration of justice becomes dependent on the willingness or unwillingness of magistrates to lend their countenance and aid to technical manoeuvrings of a very doubtful judicial character. [A. E. JONES.]

Summary Justice

Animals

Causing baboon unnecessary suffering contrary to section 1 of the Protection of Animals Act, 1911, by offering it a lighted match; fined £25, ordered to pay £10 10s. legal fees and £2 7s. costs; Woolacott: Exmouth Magistrates' Court (*Manchester Guardian,* July 16).

Disturbances

"Ardent wooer" summoned on seven charges of disturbing the peace as a result of persistently worrying an ex-girl friend, who had thrown two buckets of water over him on one occasion, but had failed to cool his ardour; bound over on his own surety of £100 to be of good behaviour for a year, and to keep the peace, particularly in regard to the girl; Kemp: Malvern Magistrates' Court (*Daily Mail,* August 8).

Carrying a girl under his left arm and "trying to imitate a gorilla," refusing to be quiet when spoken to by a police constable; bound over to be of good behaviour for 12 months; Campbell: Coventry Magistrates' Court (*Birmingham Mail,* July 22).

"Wilfully and wantonly disturbing" the inhabitants of a Kensington house by ringing the doorbell without lawful excuse contrary to section 54 (16) of the Metropolitan Police Act, 1839; fined 10s. *not* £10 as stated at [1957] Crim.L.R. 540; the maximum fine for this offence is 40s.; West London Magistrates' Court.

Drunkenness

Master of fishing vessel by neglect of duty and by reason of drunkenness caused an act tending to the immediate loss, destruction or serious damage of the fishing vessel, and caused it to collide with an open motor-boat which sank, contrary to section 220 of Merchant Shipping Act, 1894; four months' imprisonment; Martin: Oban Sheriff Court (*The Times,* August 7).

Employment agency

Carrying on an employment agency (providing baby-sitters) without a licence, contrary to a provision of the Leeds Corporation Act, 1930; four men each fined £1; Brand: Leeds City Court (*Yorkshire Evening Post,* July 26).

False pretences

Attempting to obtain 16s. 4d. wages by getting another person to " clock in " for him; fined £10; Robson: Liverpool Stipendiary Court (*Liverpool Echo,* July 29).

Larceny

Stealing street signs from Fulham Road, South Kensington; the three men admitted stealing a police No Parking sign and a bus route sign and asked for the thefts of a Kensington Borough Council notice and a board advertising ice-cream to be taken into consideration; fined £8 each and each ordered to pay £3 costs; Andres: West London Magistrates' Court (*Evening Standard,* August 7).

Road traffic

Driving a bus while under the influence of drink contrary to section 15 of the Road Traffic Act, 1930; fined £25, ordered to pay £12 12s. costs and disqualified from driving for a year; Muir: Ealing Magistrates' Court (*The Times,* August 7).

Man riding a pedal cycle while under the influence of drink to such an extent as to be incapable of having proper control contrary to section 15 (1) and (4) of the Road Traffic Act, 1930, as extended by section 11 of the Road Traffic Act, 1956; probation order for three years conditional upon not entering licensed premises for three years; Barton-upon-Humber Magistrates' Court (*Contributed*).

Taxi driver demanding greater fare than that authorised by the Hackney Carriage By-laws; fined £2, ordered to pay £2 1s. 4d. costs; Cadman: Liverpool Stipendiary Court (*Liverpool Echo,* July 31).

Wild birds

Selling wild birds' eggs contrary to section 6 of the Protection of Birds Act, 1954; two men aiding and abetting; fined a total of £50 on two summonses and ordered to pay £10 5s. 6d. costs; accomplices, one of whom had been fined a total of £100 at Chard on July 8 for similar offences, were each fined £25 and ordered to pay £5 costs; Abbott: Stamford Magistrates' Court (*The Times,* July 15).

Several charges of offering for sale wild birds' eggs, including rare osprey, peregrine and merlin eggs, contrary to section 6 of the Protection of Birds Act, 1954; fined total of £25 and ordered to pay £25 costs; Guest: Stourbridge Magistrates' Court (*Birmingham Mail,* July 5).

*Case and Comment**

Burden of Proof—*Mute of malice—fitness to plead*

R. *v.* SHARP[1] (Birmingham Assizes: Salmon J.: July 10, 11, 1957).

The prisoner was arraigned on an indictment containing a number of counts charging him with indecent assaults on young girls. On arraignment he stood mute, and a jury was sworn to try the preliminary issue whether the prisoner was mute of malice or by visitation of God. Salmon J. ruled that the onus was on the prosecution to prove malice, and that the standard of proof was that normally resting on the prosecution in a criminal case and not the mere balance of probabilities. The prosecution, accordingly, opened this case and called witnesses. The defence also called witnesses and made the first address to the jury. The jury found that the prisoner was mute by visitation of God.

The prosecution then contended that there were two further issues to be tried (i) whether the prisoner was fit to plead, and (ii) whether he was fit to stand his trial. Salmon J. ruled that there was one issue only, "whether the prisoner is capable of pleading to and of taking his trial on the indictment." He said that he would direct the jury that, if they should find that the prisoner was unable to communicate with his legal advisers, he should be found unfit to plead. He further ruled that a prisoner is presumed to be fit to plead, but, if the court has reason to doubt his fitness, it is its duty to inquire into the matter and that the onus is on the Crown to begin and to prove fitness.

He directed that the same jury as had tried the issue of muteness should try the further issue; but as this last-named issue was entirely different from the earlier one and could have been tried by a fresh jury, the prosecution must re-lead the evidence already given on the first issue. The jury found that the prisoner was capable of pleading to and of taking his trial on the indictment, and the trial then proceeded on the general issue.

[T. R. Fitzwalter Butler, *Barrister-at-Law.*]

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* Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab), Barrister-at-Law.

[1] For the prosecution: *M. A. B. King-Hamilton Q.C.* and *H. J. Garrard* (instructed by the Director of Public Prosecutions). For the defence: *Bernard Gillis Q.C.* and *W. A. L. Allardice* (instructed by Hawley & Phoenix, Longton).

COMMENTARY. By the Criminal Law Act, 1827, s. 2, where any person, upon arraignment, stands mute of malice, it is lawful for the court, if it thinks fit, to order a plea of Not Guilty to be entered on behalf of such person. The Act lays down the procedure to be followed when malice is established, but says nothing about how this is to be determined. It was held in *R.* v. *Israel* (1847) 2 Cox 263 that the question, being peculiarly one of fact, is cognizable only by a jury.

In *R.* v. *Pritchard* (1836) 7 C. & P. 303 Alderson B. put to the jury the two separate issues which the prosecution contended ought to be tried in this case; but there seems to be only one substantial question —*i.e.*, Is the prisoner capable of understanding the proceedings and making a defence?

There appears to be a conflict of authority on the question of the burden of proof of fitness to plead on arraignment. In *Ley's Case* (1828) 1 Lew. 239 and *R.* v. *Davies* (1853) 3 C. & K. 328 Hullock B. and Vaughan Williams J. respectively held that the burden is on the prosecution. In *R.* v. *Turton* (1854) 6 Cox 385, on the other hand, when defending counsel submitted that he was not obliged to offer any evidence of the accused's insanity, but that it was for the prosecution to prove her sanity, Cresswell J. replied: " Why is a man to be presumed *insane* when called upon to plead? The presumption is that he is sane. . . . If you suggest that the prisoner is not in such a state of mind as to be able to plead to the indictment you must give evidence of the fact."

Perhaps the cases may be reconciled on the ground that the " evidential burden " is on the prisoner—*i.e.*, he must introduce so much evidence as might raise a doubt in the minds of a reasonable jury as to whether he is fit to plead, but when he has done so much, the burden of *proof* is on the prosecution—and that it is to this evidential burden that Cresswell J. was referring. This would also explain the apparent conflict between Salmon J.'s views, on the one hand, that a prisoner is presumed to be fit to plead, and, on the other, that the onus is on the Crown to prove fitness. Is he not referring in the first instance to the evidential burden and in the second to the burden of proof?

Court of Criminal Appeal — *Appeal — abandonment — renewal of appeal*

R. *v.* MOORE [2] (Court of Criminal Appeal: Lord Goddard C.J., Byrne and Devlin JJ.: June 25, 1957) ([1957] 1 W.L.R. 841).

M., having been convicted at quarter sessions, applied for leave to appeal to the Court of Criminal Appeal. Subsequently he gave notice of abandonment of his appeal. On the hearing of M.'s application for leave to withdraw his notice of abandonment:—

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[2] The applicant did not appear and was not represented. The Crown was not represented.

Held, refusing the application, that by virtue of rule 23 of the Criminal Appeal Rules, 1908, where a notice of abandonment is given to the court, the appeal is deemed to have been dismissed, and, accordingly, the court had no power to allow a notice of abandonment to be withdrawn. If, however, the appellant alleged a mistake or fraud, which, if established, would enable the court to say that the notice of abandonment should be treated as a nullity, the court would exercise its inherent jurisdiction to treat the notice as such. In the present case there was no ground whatever for saying that the notice of abandonment was given under any misapprehension or that M. was misled into giving it, and the application would, therefore, be refused. [H. P.]

COMMENTARY. See *R.* v. *Healey* [1956] Crim.L.R. 257 and commentary thereon.

Larceny—*Intent to steal—wrongful taking*

R. *v.* KINDON[3] (Court of Criminal Appeal: Lord Goddard C.J., Byrne and Devlin JJ.: July 15, 1957).

K. was convicted at quarter sessions of stealing in a dwelling-house. The facts were that K., with two other girls, had spent an evening with one P. During P.'s absence from the flat the sum of £1,100 was taken from P.'s desk. K. then went by train to Doncaster with the other two girls. One of the other girls had possession of the money on the train and she subsequently shared it among the three of them, K.'s share being £150. At the trial K.'s evidence was that she was so drunk when the money was taken as to be incapable of forming any intent to steal and that the first time she remembered seeing the money was when she was shown it on the train to Doncaster. The jury convicted K. of stealing £150 in a dwelling-house. On appeal to the Court of Criminal Appeal:—

Held, dismissing the appeal, the original taking of the £1,100 had been wrongful although not felonious, and where a wrongful taking was coupled with a subsequent *animus furandi,* that amounted to larceny. The taking of the money was tortious and the subsequent conversion of it constituted larceny. The evidence showed that K. had joint possession with the other two women at the material time, and accordingly possession was continuous so that the case was indistinguishable from *R.* v. *Riley* (1853) Dears. C.C. 149. [H. P.]

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[3] For the appellant: *Conrad Dehn* (instructed by Oswald, Horton & Smith). For the Crown: *N. M. Collins* (instructed by the Solicitor, Metropolitan Police).

COMMENTARY. *R.* v. *Riley* has been vigorously criticised as inconsistent with the rule that the *animus furandi* must exist at the time of taking: J. W. C. Turner, "Two Cases of Larceny," *The Modern Approach to Criminal Law,* 356, 374. The case was, however, followed by the Divisional Court in *Ruse* v. *Read* (1949) 36 Cr.App.R. 67, and the present decision makes it quite clear that it is still law, though (as Mr. Turner wrote of *Ruse* v. *Read* in Russell on *Crime,* 1186) the report does not reveal "how, if at all, the court reconciled their decision with the express words of section 1 of the Larceny Act, 1916, 'with intent, at the time of such taking, permanently to deprive the owner thereof.'"

In *Rose* v. *Matt* [1951] 1 K.B. 810, 813; 35 Cr.App.R. 1, 4. Lord Goddard C.J. said: "We have now only to look at the Act (*sc.* the Larceny Act, 1916) to find what amounts to larceny.[4] The old cases may be of assistance in the construction of the Act, but, if the words of the Larceny Act, 1916, are clear, that Act governs the decisions which this court must give." This principle seems to have been ignored in the present case.

The anomalous nature of the rule in *Riley* is brought out by the present case where the accused was convicted of larceny in a dwelling-house (a more serious crime than simple larceny) when she had no intent to steal until after she had left the dwelling-house.

Larceny—*Stealing by finding—finding by child—misappropriation by adult*

MCGREGOR *v.* BENYON [5] (Q.B. Divisional Court: Lord Goddard C.J., Slade and Gorman JJ.: July 9, 1957).

A four-year-old daughter of the respondent found a handbag, containing a retail tradesman's savings book, in a garden near her home. She took it to her mother, who, making no attempt to find the owner, put it away in a cupboard. A few days later the mother took the savings book to the retailer's shop and there tried to exchange the stamps in the book for toys. The metropolitan magistrate, sitting at the West London Magistrates' Court, dismissed an information, alleging larceny by the mother, on the ground that there was no evidence that she had found the handbag; there was, however, evidence that it had been given to her by a child incapable in law of stealing it, either by finding or otherwise. He held that it was not clear from the facts of *Walters* v. *Lunt* [1951] 2 All E.R. 645—where an information alleging the receipt of stolen goods by parents from their seven-year-old son had been dismissed—whether the goods had been found by the parents or brought to them by their son. He also held that that part of the judgment which suggested that the parents could have been convicted of stealing by finding was *obiter dicta*.

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[4] This first sentence was omitted in the *Law Reports*.

[5] For the appellant: *Paul Wrightson* (instructed by the Solicitor for the Metropolitan Police, New Scotland Yard). The respondent did not appear and was not represented.

Held, that the magistrate was wrong in dismissing the information; the decision in *Walters* v. *Lunt* that the parents could have been convicted of stealing by finding was not *obiter dicta*, and was therefore binding upon him; the mother, in the present case, had adopted her daughter's acts; it was as though she had found the handbag herself and she could not rely upon the child's defence of infancy.

[David Calcutt, *Barrister-at-Law*.]

COMMENTARY. See the commentary on the decision of the metropolitan magistrate [1957] Crim.L.R. 250.

With great respect it is very difficult indeed to see how Lord Goddard's observations concerning larceny by finding out in *Walters* v. *Lunt* could be described otherwise than as *obiter dicta*. The charge being one of receiving stolen goods, remarks concerning the liability of the accused to be convicted, on the facts of the case stated, of larceny could hardly be necessary for the decision. Indeed, the suggestion that a charge of larceny, if preferred, would be successful would seem, with respect, to be just about as *obiter* as any dictum could possibly be. The fact that it was uttered at all has been criticised; thus, Dr. Glanville Williams wrote (15 *Modern Law Review* 222): "It seems somewhat unfortunate that the court should have uttered this particular dictum so categorically when it had not heard counsel for the parents (who did not appear at the appeal), and when there was a possibility that if a charge of larceny by finding were preferred, it would come back to the same court by way of appeal." It seems still more unfortunate that the dictum should be said to be binding on inferior courts.

The substance of the dictum in *Walters* v. *Lunt* was also criticised on the ground that on the facts of that case there was no evidence of a taking from the possession of the prosecutor. The prosecutor could not be said to be in possession at the moment when the parents received the "stolen" cycle from their son. The court seems to have attempted to get over this difficulty in the instant case by importing the doctrine of ratification from the law of agency into the criminal law. It is well established that a crime can be committed through an innocent agent where the accused has given authority *before* the *actus reus* is committed: see, *e.g.*, *R.* v. *Manley* (1844) 1 Cox 104; *R.* v. *Butt* (1884) 51 L.T. 607; but to hold that mere ratification can in itself impose criminal liability for acts already done would seem to be a wholly unwarranted extension of the criminal law: see Glanville Williams, *The Criminal Law*, section 57, n. 1. Like the creation of new offences (*cf. R.* v. *Newland* [1954] 1 Q.B. 158, 165), such extensions should, it is submitted, be made, if at all, only by the legislature and not by the judges.

Larceny—*Taking—possession*

RUSSELL v. SMITH[6] (Q.B. Divisional Court: Lord Goddard C.J., Slade and Gorman JJ.: July 11, 1957) ([1957] 2 All E.R. 796).

S., a lorry driver employed by a firm of haulage contractors, was instructed to collect from C. & B. Ltd. a ton of feeding stuff and deliver it to J. Unknown to S. eight sacks too many were in error loaded onto his lorry. He did not discover the mistake until he came to unload the goods, when he decided to keep the eight sacks for himself. On an information against S. charging him with stealing the eight sacks, the justices, holding that there was no " taking " within section 1 of the Larceny Act, 1916, sufficient to amount to larceny, dismissed the information. On appeal by the prosecutor:—

Held, allowing the appeal, applying *R.* v. *Hudson* [1943] K.B. 458 and distinguishing *Moynes* v. *Coopper* [1956] 1 Q.B. 439; [1956] Crim.L.R. 268, that although a person cannot take into his possession something of which he has no knowledge, once S. discovered that he had the extra sacks in his possession and decided to keep them there was a " taking " within the meaning of the Act and he was guilty of larceny. [J. D. P.]

COMMENTARY. The case appears to have been argued and decided on the assumption that the accused had possession of the cargo of feeding stuff except for the eight additional sacks; and that he would have had possession of these but for his mistake and that of C. & B. Ltd. which, in some way, prevented him from doing so. It is surely a preposterous fiction that a man should be said to have possession of one sack in his lorry and not that of another which is underneath or alongside it! He has exactly the same physical control over both sacks and his state of mind is the same with respect to both. How would one ascertain which sacks he possessed and which he did not? Apparently the accused was convicted of stealing eight sacks which were left when the rest had been unloaded. Yet these eight were presumably the first sacks to be loaded and therefore prima facie not those which were put in in error.

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[6] For the prosecution: *E. L. Gardner* (instructed by Reed & Reed for Clarke, Willmott & Clarke, Taunton). For the defendant: *J. A. S. Hall* (instructed by McKenna & Co. for Moger, Couch & Ligertwood, Wiveliscombe).

Of course it may be that the court thought that the eight additional sacks prevented the accused from having possession of any—but that is hardly less absurd. The judgment seems, with great respect, to be an illustration of the "tendency, inspired by moral disapproval of obviously dishonest conduct, to adopt whatever theory of possession will enable the conviction of the accused person to be upheld." (Kenny, *Outlines of Criminal Law* (16th ed. by J. W. C. Turner), 249.)

Thus in the instant case Lord Goddard has said: "If somebody leaves something in my house and I do not know that he has left it, it does not seem to me that it could be said that I am in possession of that property." Yet in *Hibbert* v. *McKiernan* [1948] 2 K.B. 142, 150—where the opposite conclusion was desirable in the interests of conviction—he said: "A, meaning to give his neighbour, B, a present of game takes a brace of pheasants to the latter's house; finding the door open he leaves them in the hall, and thereby abandons both his property in and possession of them. B has at the moment gone out to post a letter, so does not know of A's gift. C, who has seen A's action, enters the house before B returns and steals the game. Can it be doubted that C is guilty of larceny and that the property can rightly be laid in B?"

The difficulty, as in so many of the cases, arose from the rule that the *animus furandi* must be formed at the time of taking, a rule which, perhaps more than any other, contributes to making the law of larceny "the public scandal" to which the Lord Chief Justice alluded. A new statutory definition in which that rule—and others—would have no part is long overdue. The doctrine of "Larceny by Finding Out" (see [1956] Crim.L.R. 516) is given yet another complication by the present case.

The pity is that the present case could, it is respectfully submitted, have been decided the same way without invoking that much criticised doctrine and without doing such violence to the concept of possession, simply by analysing the facts in accordance with well established principles. Presumably the lorry was the property of the accused's employers and therefore in their possession, not in his. He would merely have custody of it. Therefore, when the sacks were put into the lorry they too passed into the possession of the employers and the accused had merely custody of them also: *R.* v. *Reed* (1854) D. & P. 256. When the accused fraudulently removed the eight sacks from the lorry he stole them from his master's possession. So regarded the case does not differ essentially from that of the dustmen who were convicted recently of stealing refuse from the corporation dustcart in *Williams* v. *Phillips* [1957] Crim.L.R. 186.

A further point of interest in the case is that Lord Goddard said: "Being a decision of the Court of Criminal Appeal *R.* v. *Hudson* is binding on this court, as indeed it would have been if it had been a decision of the Divisional Court. The Divisional Court is a final court of appeal in criminal matters, no further appeal lying to either the Court of Criminal Appeal or the House of Lords. It does not seem to have been clearly decided in any previous case that the Divisional Court is bound by the Court of Criminal Appeal's decisions. See Salmond, *Jurisprudence* (11th ed.) 173; Winder, "Divisional Court Precedents," 9 *Modern Law Review* 257, 260. If an earlier decision of the Divisional Court conflicted with a decision of the Court of Criminal Appeal by which would the Divisional Court be bound? Or could it choose that which it thought better?

Larceny by a bailee—*Bailment of cheque—money entrusted for specific purpose*

R. *v*. HASTINGS[7] (Liverpool Crown Court: Judge Laski Q.C.: July 22, 23, 24, 1957).

H. was indicted, *inter alia*, on a count alleging that he stole as bailee the sum of £200 entrusted to him by W., contrary to section 1 (1) of the Larceny Act, 1916.

D. was buying a car on hire-purchase from the U.D.T. Co. and wished to sell it to W. H. agreed to pay the instalments owing to the U.D.T., acquire the car and obtain a new hire-purchase agreement for W. with the A. Co.

W. paid H. at his request a cheque for £200 payable to the Anchor Agency, which was the business association of H. and another. All such cheques were required to be endorsed by both associates. H. told W. that the A. Co. wanted a further deposit; W. refused, and required the return of the £200. H. failed to repay it.

W. stated in evidence that the cheque was crossed, and that he expected H. to pay the cheque to the Anchor Agency and with the proceeds to arrange the deposit. So far as he was concerned, provided that H. arranged the hire-purchase for him it was quite in order for H. to pay the money to any hire-purchase company or to pay it to D in respect of the contributions D had already paid.

W. also stated that he originally asked H. to pay £250, the extra £50 being for repairs which W. had made to the vehicle while it was in his custody.

Counsel for the defence submitted that there was no case to answer, on the ground that H. was not a bailee of the £200, but a trustee of the cheque for that amount, and that a charge of larceny would not lie unless the thing allegedly bailed was to be returned *in specie*.

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[7] For the prosecution: *George Bean, David Berkson* (instructed by the Town Clerk, Liverpool). For the defence: *Montague Dovener* and *Peter G. Smith* (instructed by Hannay Horton & Cook, Liverpool).

He referred to *Halsbury,* 10th ed., at p. 769; *R.* v. *Hassall* (1861) Ld. & Co. 56, and *R.* v. *Garrett* (1860) 2 F. & F. 14.

Held, overruling the submission and following *R.* v. *Aden* (1873) 12 Cox 512, that there was evidence to go to the jury that H. was entrusted with the money for a specific purpose and without the intention of transferring ownership, and contrary to that purpose used the money for himself.

[Peter G. Smith, *Barrister-at-Law.*]

COMMENTARY. According to Paton, *Bailment in the Common Law,* 6, the essential features of bailment are (1) delivery of possession, and (2) a specific mandate which requires the identical *res* either to be returned to the bailor, or to be dealt with in a particular way.

It seems that H. was convicted of larceny, not of the cheque itself, but of the money which he presumably received for it. (It is not, of course, larceny wrongfully to cause a customer's account at a bank to be debited, for in such a case there is no asportation of any money: *R.* v. *Davenport* (1954) 38 Cr.App.R. 37.) This involves holding that the ownership in any money which H. received for the cheque vested in W. This would be in accordance with the view of the commentator (" Embezzlement and the Disobedient Servant," 19 *Modern Law Review* 39) that, where an agent converts his principal's property into another form, the legal ownership in the property in its new form vests in the principal; but contrary to the view of Mr. J. W. C. Turner (" The Davenport Case " [1956] Crim.L.R. 589, 659, 730).

A case which is closely analogous to the present is *R.* v. *De Banks* (1884) 13 Q.B.D. 29. The prisoner, who was entrusted with a mare to sell her, did so and misappropriated the proceeds. It was held, Stephen J. dissenting, that he was guilty of larceny as a bailee of the money he received for the mare. Mr. Turner prefers the view of Stephen J. *cf.* Russell on *Crime,* 1134.

Licensed Premises—*Music licence—singing after permitted hours*

TAYLOR *v.* LOVATT AND HARDING [8] (Hanley Magistrates' Court: R. N. Macgregor Clarkson Esq., Potteries Stipendiary Magistrate: June 25 and July 2, 1957).

The defendant L. was summoned for allowing singing to take place at the " Mistletoe Inn," Northwood, Stoke-on-Trent, after permitted hours contrary to section 51 (7) and (9) of the Public Health Acts Amendment Act, 1890, under which Act he held a licence permitting him to use those premises for public entertainment. H., who was employed by L. as a pianist, was summoned for aiding and abetting him contrary to section 35 of the Magistrates' Courts Act, 1952.

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[8] For the prosecution: Mr. R. F. Corder, Solicitor, Town Clerk's Office, Stoke-on-Trent. For the defence: Mr. H. C. Clive Collis, Solicitor, Stoke-on-Trent.

The evidence was that two police officers, having heard loud singing coming from the "Mistletoe" at 10.45 p.m. on May 4, 1957, kept observation on the premises until 11 p.m. when they went into the public-house through the back door. Inside they found about forty people. The officers informed L., who was the licensee of the "Mistletoe" that they had been keeping observation on the public-house and that at no time had they heard him make any attempt to stop the singing. They also reminded him that on September 28, 1956, they had had cause to remind him of the conditions of his licence. They said that they were going to report him on this occasion. The evidence against H. was that, although he had locked the piano before 10.30 p.m., he seemed to be leading the singing.

For the defence it was argued that under the Public Health Acts Amendment Act, 1890, the offence was that the place was kept open for public entertainment between certain hours not stated in the licence. There was no question of "permitting" singing, and spontaneous singing did not come within the Act.

Mr. Macgregor Clarkson said that he did not believe that the singing was spontaneous. Each defendant was fined £1 with one guinea special costs.

[F. Williams, *Clerk to the Staffordshire Potteries Stipendiary Magistrate.*]

COMMENTARY. The judicial interpretation of the term "permits" is examined by J. Ll. J. Edwards, *Mens Rea in Statutory Offences,* especially Chapter IV. He concludes (p. 253) that the term requires two conditions of liability: (1) "the accused must be shown to have had guilty knowledge that the forbidden event is happening"; (2) "the accused, with such knowledge and being in a position to prevent the event happening, does nothing about it."

Murder—*Constructive malice—intent to do grievous bodily harm*

R. *v.* VICKERS[9] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery, Byrne, Slade and Devlin JJ.: July 5, 1957) ([1957] 3 W.L.R. 326).

V. was convicted at assizes of capital murder. V. had broken into a house for the purpose of stealing. An elderly lady who lived in the house came down into the cellar where V. was, whereupon V. attacked her as a result of which she died. There was evidence that V. struck the deceased a good many blows with his fists and also that he kicked her in the face, but the injuries could have been inflicted with a moderate degree of violence. V. appealed to the Court of Criminal Appeal on the ground that the offence did not amount to murder by virtue of section 1 (1) of the Homicide Act, 1957. Section 1 (1) provides that where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

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[9] For the appellant: *D. J. Brabin Q.C., Morris Jones* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Sir Reginald Manningham-Buller Q.C., A.-G., J. di V. Nahum Q.C., Desmond Bailey* (instructed by the Director of Public Prosecutions).

Held, dismissing the appeal, that the effect of section 1 (1) was that, where there was a killing in the course or furtherance of another offence, the other offence was to be ignored; the circumstances of the killing alone were to be considered and if the killing would amount to murder by reason of the express or implied malice of the prisoner then it was capital murder. Formerly any degree of violence used by the prisoner in the course or furtherance of a felony of violence amounted to murder; now if the prisoner intended only trifling harm or no harm at all that would not amount to murder. It was to be observed that section 1 (1) preserved " implied malice " as well as " express malice." In the present case the " other offence " (referred to in the opening words of the subsection) referred to the burglary and not to the infliction of grievous bodily harm. Malice aforethought could be implied where the prisoner inflicted grievous bodily harm, that is to say, where he had, by a voluntary act, intended to harm the victim and the victim had died as a result. In the present case there was evidence from which the jury could properly imply malice aforethought and the judge's direction had been perfectly proper. Accordingly the appeal would be dismissed. [H. P.]

COMMENTARY. This decision reaffirms the commonly accepted meaning of malice aforethought as stated in, *e.g.*, Stephen, *Digest of the Criminal Law,* Article 264; Kenny, *Outlines of Criminal Law,* para. 107; Russell on *Crime,* 543; Archbold, 928; Report of the Royal Commission on Capital Punishment (Cmd. 8932), para. 27. The term " constructive malice " is commonly reserved for those two forms of malice aforethought which consisted in (i) an intent to commit a felony; (ii) an intent violently to resist a lawful arrest by an officer of justice; Kenny, para. 108; Russell, *op. cit.*; Report of the Royal Commission, para. 78. Devlin J., however, would take a wider view of the term, and would include within it (iii) intent to do grievous bodily harm: see [1954] Crim. L.R. 668. The commentators on the Bill and the Act seem to have assumed as being too clear for argument that, as the court has now decided, the effect of section 1 was to abolish only the first two of the three forms of malice aforethought specified above, and to leave intact the doctrine that killing by an act done with intent to do grievous bodily harm is murder: see D. W. Elliott [1957] Crim.L.R. 282; J. E. Hall Williams, IX *Howard Journal* 285, 286; 76 *Law Notes* 122; S. Prevezer, "The English Homicide Act," 27 *Columbia Law Review* 624, 636, and the Note in "*Current Law*" *Statutes*, 1957. Apparently the Act also leaves intact the doctrine of *R.* v. *Ward* [1956] 1 Q.B. 351; [1956] Crim.L.R. 203; that a person may be guilty of murder if a reasonable man, in his position, would have contemplated that death or grievous bodily harm was likely to result from his conduct; although the accused, not being a reasonable man, did not so contemplate. See S. Prevezer, "Murder by Mistake," [1956] Crim.L.R. 375, for a criticism of *Ward's* case.

In his summing-up—which the Court of Criminal Appeal thought "quite impeccable"—Hinchcliffe J. said: "The grievous bodily harm need not be permanent, but it must be serious, and it is serious or grievous if it is such as seriously and grievously to interfere with the health or comfort of the victim." As Devlin J. has written, "Murder by pin prick is not a legal impossibility," [1954] Crim.L.R. 669.

The accused's application for the fiat to appeal to the House of Lords was refused by the Attorney-General, a decision which has been vigorously criticised in Parliament. The fact that, at the first hearing of the case (before Lord Goddard C.J., Byrne and Devlin JJ.) "there was not complete unanimity"—though this was achieved after the full court of five members was assembled—gave some substance to the argument that this was a case which ought to be reviewed by the highest tribunal. The Attorney-General took the view that there was no really tenable argument in favour of the prisoner.

See also pp. 566 *et seq.*, *ante.*

Murder—*Diminished responsibility—onus of proof*

R. *v.* DUNBAR [10] (Court of Criminal Appeal: Lord Goddard C.J., Byrne and Devlin JJ.: July 5, 1957) (*The Times*, July 6, 1957).

D. was convicted at assizes of capital murder. D. had killed an old lady after breaking into her house for the purpose of stealing. D. relied at the trial solely upon the issue of "diminished responsibility" under section 2 of the Homicide Act, 1957. A psychiatrist, who gave evidence for the defence, said that in his opinion D. was a psychopath and was suffering from an abnormality of the mind. The prison doctors gave evidence that in their opinion D. was not a psychopath. D. appealed to the Court of Criminal Appeal on the ground that the jury were misdirected on the onus of proof in relation to the issue of diminished responsibility.

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[10] For the appellant: *P. Stanley Price Q.C., J. R. Johnson* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Sir Reginald Manningham-Buller Q.C., A.-G., Geoffrey Veale Q.C., J. C. Willis* (instructed by the Director of Public Prosecutions).

Held, allowing the appeal, that *R.* v. *Carr-Briant* [1943] K.B. 607 decided that, where either by statute or at common law some matter is presumed against an accused person unless the contrary is proved, the jury should be directed that that burden of proof might be discharged by the accused person establishing a preponderance of probability. It was not necessary for the accused person in those circumstances to prove the matter beyond reasonable doubt and the burden of proof was not, therefore, as heavy as that which lay on the prosecution. In the present case, by section 2 (2) of the Homicide Act, 1957, it was provided that it was for the defence to prove that a person charged was not liable to be convicted by virtue of his diminished responsibility as laid down by the section, and the judge had failed to point out to the jury the difference between the onus on the prosecution and the onus on the defence. In such cases the fact that the burden on the defence was not as heavy as the burden on the prosecution must be pointed out to the jury. The decision in *Lord Advocate* v. *Braithwaite* (1945) Session Cases, Justiciary, 55, clearly showed that the law in Scotland was the same as in England. If the proper direction had been given in the present case it was highly likely that the jury would have returned the same verdict but, where the difference was one between a capital sentence and a sentence of imprisonment, it would be undesirable to apply the proviso. Accordingly a verdict of manslaughter would be substituted and the prisoner would be sentenced to imprisonment for life. [H. P.]

COMMENTARY. It has long been established that in the one case where the common law puts the onus of proof on the accused, the defence of insanity within the M'Naghten Rules, the burden is less heavy than that which lies on the prosecution to make out its part of the case: *Sodeman* v. *R.* [1936] 2 All E.R. 1138. In *R.* v. *Carr-Briant* the Court of Criminal Appeal laid down a general principle which appears to apply to all cases where the burden of proof is put on the accused either by common law or statute.

In a recent case the Lord Chief Justice suggested that judges should not use the traditional phrase, " beyond reasonable doubt," when directing juries but should simply tell them that they must be " satisfied by the evidence " or satisfied " so that they can feel sure ": *R.* v. *Summers* (1952) 36 Cr.App.R. 14. This suggestion appears to have contributed to difficulties which arose in a number of subsequent cases examined by

Dr. Glanville Williams in [1955] Crim.L.R. 464. A veto on the "beyond reasonable doubt" formula greatly increases the difficulty of explaining to a jury the difference between two standards of proof where, as in the present case, that becomes necessary. The adoption by the court of the *Carr-Briant* principle, involving, as it does, a contrast between "beyond reasonable doubt" and "preponderance of probability," may, perhaps, be taken as a welcome rehabilitation of the traditional phrase.

Section 4 (2) of the Homicide Act throws the burden of proof on to the accused to show that a killing was done in pursuance of a suicide pact between himself and the deceased. It is clear that here also the proof required of the accused will be "preponderance of probability."

Murder—*Provocation—onus of proof*

R. *v.* McPherson[11] (Court of Criminal Appeal: Lord Goddard C.J., Byrne and Devlin JJ.: July 22, 1957) (*The Times,* July 23, 1957).

M. was convicted at assizes of capital murder in the following circumstances. M. lived with his sister. The deceased, who was apparently a man of violent character and a bully, had from time to time paid unwelcome attentions to M.'s sister. On the day of the shooting M. took out a shot-gun, of which the barrel had been sawn off by him, concealing it under his coat. The deceased then came along on a bicycle, shouted out some provocative words to M. and rode off in the direction of the sister, whereupon M. produced the shot-gun and fired four shots at close range at the deceased. M. said in evidence that he was in fear of the deceased, that he only intended to use the gun for the purpose of frightening him and that he had been provoked by the deceased. M. appealed to the Court of Criminal Appeal on the ground that the judge failed to direct the jury that where the defence was one of provocation the onus of proof was on the prosecution.

Held, allowing the appeal, that if the question of manslaughter had not been left to the jury at the trial this court would not have interfered; for how could it be said that the killing was done in a gust of passion when there was not one shot but four shots fired, and each shot involved the breaking of the gun for reloading. But once manslaughter was left to the jury the principles laid down in *R.* v. *Lobell* [1957] 1 Q.B. 547; [1957] Crim.L.R. 323, in relation to self-defence applied. Those principles were that the onus of proof remains throughout on the prosecution and, therefore, if the jury are in any doubt where the truth lies the issue should be determined in the prisoner's favour. That was true of an issue as to self-defence and as to provocation. In the present case the jury were not directed that if they were in doubt as to whether or not M. was acting under provocation the verdict should be one of manslaughter. A verdict of manslaughter would, accordingly, be substituted for the verdict of capital murder and a sentence of twelve years' imprisonment would be substituted for the capital sentence. [H. P.]

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[11] For the appellant: *W. A. Fearnley-Whittingstall Q.C., A. R. M. Ellis* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *W. A. Sime Q.C., N. MacDermott* (instructed by the Director of Public Prosecutions).

COMMENTARY. The only burden on the prisoner who raises the defence of provocation is the so-called "evidential burden": *i.e.*, he does not have to *prove* anything, but only to introduce so much evidence as might raise a reasonable doubt in the minds of the jury as to whether the conditions of the defence are satisfied. If he can only raise such a doubt he is entitled to be acquitted. If the judge had ruled that the evidential burden was not satisfied and that, consequently, the question of manslaughter should not be left to the jury at all, the court, apparently, would not have interfered.

As the court was prepared to hold that there was no evidence on which a jury might feel a reasonable doubt whether the accused was provoked (a question of law), was it not illogical to quash the conviction?

National Insurance Contributions — *Civil debt — recoverable as penalty*

R. *v.* MARLOW (BUCKS) JJ., *ex p.* SCHILLER [12] (Q.B. Divisional Court: Lord Goddard C.J., Byrne and Devlin JJ.: July 10, 1957) ([1957] 3 W.L.R. 399).

S. pleaded guilty to an information under the National Insurance Act, 1946, charging him with failure to pay an insurance contribution. He was fined £4 and costs and ordered to pay £38 arrears of contributions under regulation 19 of the National Insurance (Contributions) Regulations, 1948. On failure to comply with the order, S. was brought before the justices on a summons and they committed him to prison for three months. S. applied for an order of certiorari to quash the committal order on the ground that the £38 was enforceable only as a civil debt, and that the procedure adopted by the justices on making the order was that prescribed for enforcing payment of sums payable on summary conviction; that the period of imprisonment imposed was in excess of the maximum period applicable under the Magistrates' Courts Act, 1952, for default in payment of a civil debt and, therefore, that the order was bad in law.

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[12] For the applicant: *David Kemp* (instructed by Giffen, Couch & Gilmore). For the Minister of Pensions and National Insurance: *Rodger Winn* (instructed by Solicitor, Ministry of Pensions and National Insurance). For the justices: *J. M. Milne* (instructed by Preston, Lane-Claypon & O'Kelly for Reynolds, Parry-Jones & Crawford, High Wycombe).

Held, dismissing the application, that the combined effect of section 54 (1) of 1946 and regulation 19 (5) of the regulations of 1948 was that contributions could be recovered either as a civil debt or as a penalty, although once their recovery as a penalty had been ordered they could no longer be described as enforceable as a civil debt within paragraph 4 of the Act of 1952; accordingly, the committal order was good and the motion failed. [J. D. P.]

COMMENTARY. Section 54 (1) of the 1946 Act provides that all sums due to the National Insurance Fund shall be recoverable summarily by the Minister as civil debts due to the Crown; but without prejudice to any other remedy. By regulation 19 (5) of the 1948 regulations, any sum ordered to be paid under that regulation is recoverable as a penalty, *i.e.*, in the same way as a fine is recovered. See *Shilvock* v. *Booth* [1956] 1 W.L.R. 135; [1956] Crim.L.R. 273.

Privy Council—*Appeal allowed—retrial ordered—evidence wrongly admitted at first trial*

LAMBROU *v.* R.[13] (Judicial Committee of the Privy Council: Earl Jowitt, Lord Tucker and Mr. L. M. D. de Silva: July 18, 1957).

L., a Greek Cypriot was convicted by the Special Court at Nicosia under reg. 52 (*a*) of the Emergency Powers (Public Safety and Order) Regulations, 1955–56, of shooting at a warrant-officer of the R.A.S.C. with a revolver. His appeal to the Supreme Court was allowed and his sentence of death set aside, but a retrial was ordered.

On a petition to the Judicial Committee for special leave to appeal, it was contended on behalf of L. that a new trial should not have been ordered because the Supreme Court had allowed the appeal on the ground that an alleged voluntary statement by L., who had pleaded an alibi, had been wrongly admitted and had said that "it is impossible to say that no substantial miscarriage of justice was occasioned." It was contended that to allow a retrial would merely be giving the prosecution "a second bite at the cherry," and enable them to fill in a gap in their evidence. To order a retrial in the circumstances was an improper exercise of the court's discretion under section 142 of the Cyprus Criminal Procedure Law.

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[13] For the petitioner: *Ralph Millner, Chrysses Dimetriades* (instructed by Gastes & Turner). For the Crown: *D. A. Grant* (instructed by Charles Russell & Co.).

The petition was dismissed. [J. D. P.]

Recovery of Stolen Property—*Action against convicted person—evidence*

Martins Bank Ltd. *v.* Frazer[14] (Queen's Bench Division: Glyn-Jones J. and a jury: July 18, 1957) (*The Times*, July 19, 1957).

Between Saturday, February 5, 1955, and the following Monday, thieves broke into the plaintiffs' bank and stole over £20,000 in notes. The bank, alleging that the defendant was one of the thieves, claimed that he was liable to them for the loss. The defendant had already been convicted at the Old Bailey on a charge of being concerned in the raid. Glyn-Jones J. directed the jury that if they thought that the defendant was one of the thieves who went into the bank or that he took part in the planning of the robbery, even if he did not go into the premises, then he was liable to the bank. His case was that the evidence against him was false and had been fabricated from beginning to end. " There was no doubt at all that from time to time police officers had misbehaved themselves. You will not say that you do not believe that the police could ever do such a thing nor will you say that you know that the police are always doing it. Neither would be justice. But you may think that if experienced police officers had intended to acquire fabricated evidence to be planted on Frazer they could have made rather a better job of it."

The jury returned a verdict for the bank for £19,602. [J. D. P.]

Commentary. The fact that Frazer had been convicted of the theft in a criminal court was not admissible evidence to prove he stole the money in the subsequent civil action: *Hollington* v. *Hewthorne & Co. Ltd.* [1943] 1 K.B. 587; but the defendant himself told the jury of his conviction. The judge warned the jury that they were not entitled to shelter behind that verdict. For criticisms of this rule of evidence, see J. A. Coutts, " The Effect of a Criminal Judgment on a Civil Action," 18 *Modern Law Review* 231; Cowen and Carter, *Essays on the Law of Evidence* 173.

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[14] For the plaintiffs: *John Hobson Q.C., R. J. Parker* (instructed by Linklaters & Paines). The defendant appeared in person.

Rent Control—*Rent fixed by tribunal and entered in local authority's register—increased rent charged*

R. *v.* ADAMSON[15] (Court of Criminal Appeal: Lord Goddard C.J., Byrne and Devlin JJ.: July 15, 1957) (*The Times,* July 16, 1957).

A. was convicted at quarter sessions of twelve charges of letting furnished rooms at a rent in excess of the registered rent and was sentenced to a fine of £2 on each count, ordered to repay the amount overcharged (amounting to £10 10s.) and ordered to pay £15 15s. costs. The facts were that in November, 1949, A.'s then tenant referred his contract of letting to the rent tribunal under section 2 of the Furnished Houses (Rent Control) Act, 1946, and the tribunal fixed the rent at £2 per week. The rent so fixed was duly entered in the register of the local authority in accordance with section 3 of that Act. In July, 1954, A. relet the same rooms, which had been refurnished and redecorated, to a new tenant at a rent of £2 15s. per week (subsequently increased to £2 17s. 6d. per week). A. was an elderly lady and an old age pensioner. She appealed to the Court of Criminal Appeal against her conviction and sentence on the main ground that the premises having been refurnished and redecorated were not the same premises to which the entry in the register related.

Held, dismissing the appeal against conviction, that where a rent was entered in the register of the local authority it was an offence to require or receive on account of rent any sum in excess of the rent so entered. A. had clearly contravened the Act: refurnishing and redecorating rooms did not make them new premises to which the entry in the register did not apply. A. had, however, provided better accommodation for the tenant and she had mistakenly, though perhaps not unreasonably, thought that she was entitled to increase the rent accordingly. In the circumstances it would be enough if A. returned the overpayment of £10 10s. Accordingly A. would be given an absolute discharge and the order for costs would not be affirmed. [H. P.]

Road Traffic—*Obligation to maintain brakes in efficient working order—"permitting" user—"using"*

HART *v.* BEX[16] (Q.B. Divisional Court: Lord Goddard C.J., Slade and Gorman JJ.: July 11, 1957).

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[15] For the appellant: *R. E. Hammerton* (instructed by the Registrar, Court of Criminal Appeal). *J. T. Plume* appeared for the Chingford Borough Council (instructed by the Town Clerk).

[16] For the appellants: *R. B. C. Parnall* (instructed by Field, Roscoe & Co., for Guy H. Davies, Clerk, Gloucestershire County Council).

B., a driver employed by British Road Services, was charged before Gloucester justices upon an information alleging that on December 11, 1956, he unlawfully used on a road a motor vehicle, to wit, an articulated lorry, in that the means of operation of the braking system was not maintained in good and efficient working order and properly adjusted, contrary to regs. 76 and 104 of the Motor Vehicles (Construction and Use) Regulations, 1955. B., while driving along the road in question, had occasion to apply his brakes (which had hitherto worked perfectly) in order to pull up behind two cars which had stopped to allow a flock of sheep to pass. The brakes failed to stop the car and, in swerving to avoid the other two cars, B. hit and killed a number of sheep. The justices found that it was no part of B.'s duty to inspect the braking system of his lorry; that the brakes failed because at the time that they were applied there was a hole in the brake pipe due to the fact that the main electric lead from the battery to the starter was in an incorrect position and had caused a short circuit. They found that the braking system was properly adjusted, and held that as the defect in it was caused by a fault in another part of the vehicle B. had committed no offence. They dismissed the information against him. The police appealed.

Held, that the court had decided in *James & Son* v. *Smee* [1955] 1 Q.B. 78; [1955] Crim.L.R. 42, that the obligation to maintain the braking system in good and efficient working order was an absolute one so that a person who drove a car with a defect in the brakes committed an offence even though the defect was due to a fault in the mechanism of some other part of the car. Therefore B. was technically guilty, but as it was not his duty to inspect the brakes, the court regretted that he had been prosecuted and the justices should be told that this was a case for an absolute discharge. Had his employers been prosecuted for "using" the vehicle (instead of "permitting" the use of it, the offence with which they had in fact been charged) they would have had no defence.

[Mrs. E. M. Wellwood, *Barrister-at-Law.*]

COMMENTARY. In *James & Son* v. *Smee* it was held that a company could not be guilty of "permitting" a user in contravention of the regulation unless it was proved that some responsible official of the company "permitted" as opposed to "committed" the offence. The term "permit," furthermore, imports a state of mind, so a conviction for "permitting" would be proper only where it was proved that a responsible official of the company knew the material facts which constituted the offence. *Cf. Taylor* v. *Lovatt and Harding*, above, p. 613. Where a charge is for "using" no such *mens rea* is required and both the actual driver and his employer may be convicted though neither knew of the inefficient condition of the braking system.

Salmon and Freshwater Fisheries—*Taking with a light and gaff—joint enterprise—evidence*

IREMONGER *v.* WYNNE [17] (Q.B. Divisional Court: Lord Goddard C.J., Slade and Gorman JJ.: July 10, 1957).

On the evening of November 12, 1956, the respondent and another man, whose identity has never been established, were on the bank of the River Alyn in Denbighshire. One of the two men was shining a light on to the water. Later the two men, as they were walking away from the river, were stopped by water bailiffs. The unidentified man was carrying a gaff and the respondent a sack containing two salmon, both of which were later found to bear gaff marks. Informations were preferred against the respondent, alleging contraventions of section 1 of the Salmon and Fresh Water Fisheries Act, 1923. At the hearing before the justices for the division of Uwchaled, sitting at Cerrig-y-Drudion, the respondent declined to give evidence. It was contended on his behalf that there was no evidence that he had used either the light or the gaff. The justices were unable to determine whether he had used either the light or the gaff, and accordingly they dismissed the informations.

Held, that the justices were wrong in dismissing the informations. The two men were engaged on a joint enterprise. Accordingly it was immaterial which of them was holding either the light or the gaff. They were both equally guilty as aiding and abetting the other.

[David Calcutt, *Barrister-at-Law.*]

COMMENTARY. Section 1 of the Salmon and Freshwater Fisheries Act, 1923, makes it an offence to use, or to be in possession of (*inter alia*) a light or a gaff (except as auxiliary to angling with a rod and line) for the purposes of taking salmon, trout or freshwater fish.

It is well established that an accused may be convicted where the evidence shows that he was either a principal in the first degree or a principal in the second degree: *R.* v. *Swindall and Osborne* (1846) 2 C. & K. 230; *R.* v. *Salmon* (1880) 6 Q.B.D. 79; *Du Cros* v. *Lambourne* [1907] 1 K.B. 70. Where, however, one or two or more parties desisted before the crime was complete, and it is impossible to prove which, all must be acquitted: *R.* v. *Richardson* (1785) 1 Leach 387. *Cf.* Glanville Williams, *The Criminal Law,* section 66, n. 17.

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[17] For the appellant: *Helenus Milmo* (instructed by Pritchard, Englefield & Co. agents for Mason & Moore Dutton, Chester). The respondent did not appear and was not represented.

Summary Trial — *Withdrawal of consent after pleading "Not guilty"*

R. *v.* CRASKE, *ex p.* METROPOLITAN POLICE COMMISSIONER[18] (Q.B. Divisional Court: Lord Goddard C.J., Byrne and Devlin JJ.: July 2, 1957) ([1957] 3 W.L.R. 308; [1957] 2 All E.R. 772).

R., who was over seventeen years of age, appeared before a Metropolitan Magistrate on a charge of receiving a motor-car knowing it to have been stolen, an indictable offence which, by section 19 of the Magistrates' Courts Act, 1952, could be tried summarily with the consent of the accused. R. consented to being tried summarily and, having pleaded Not Guilty, the hearing was adjourned to enable him to be legally represented. At the adjourned hearing, R. through his counsel asked the magistrate to allow him to withdraw his consent to summary trial. The magistrate agreed. On an application by the police for an order of prohibition prohibiting the magistrate from enquiring into the offence as an examining justice and for an order of mandamus ordering him to hear and determine the case, it was contended that, having begun to try the case summarily, the magistrate was precluded by section 24 of the Act of 1952 from proceeding thereafter as an examining justice, and that section 19 (5) was mandatory and the magistrate was bound to proceed with the summary trial.

Held, refusing the application, that having regard to the whole scope of section 24 of the Act of 1952, the magistrate did not begin to try the case until he began to hear the evidence; in the present case all that had happened was that the magistrate had taken the plea.

Per Lord Goddard C.J.: "I do not think that one should lightly deprive persons of their right to be tried by jury if they want to." [J. D. P.]

COMMENTARY. Lord Goddard C.J. and Byrne J. reasoned by analogy to the procedure at a trial on indictment at assizes or quarter sessions, where prisoners who have pleaded guilty are constantly allowed to withdraw their pleas; and where, furthermore, the case may not be tried for as long as a fortnight after a plea has been entered. Devlin J., while not dissenting from this view, thought that, even if the trial did begin on the plea being taken, the effect of section 24 (5) was only to preclude *that* magistrate from conducting the committal proceedings; whereas, in the present case, Mr. Craske intended that another magistrate should conduct those proceedings. This view would seem to enable a magistrate to permit an accused to withdraw his consent to summary trial even after he has begun to hear the evidence in the case. See also p. 601, above.

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[18] For the Commissioner of Police: *J. H. Buzzard* (instructed by Solicitor, Metropolitan Police). For the magistrate: *Rodger Winn* (instructed by Treasury Solicitor). For the defendant: *D. Vowden* (instructed by R. W. Platt).

Acts and Orders *

Animals

PROHIBITION OF LANDING OF ANIMALS, CARCASES, AND ANIMAL PRODUCTS, AND HAY AND STRAW FROM THE CHANNEL ISLANDS (REVOCATION NO. 2) ORDER, 1957 (S.I. No. 1272): operative July 26, 1957. The principal Order (1957, S.I. No. 487; [1957] Crim.L.R. 330) is revoked; and the Channel Islands are restored to the list of countries from which importation of the named products is permitted.

EXPORTED CATTLE-PROTECTION (AMENDMENT) ORDER, 1957 (S.I. No. 1254): operative August 22, 1957. The principal Order (1957, S.I. No. 170; [1957] Crim.L.R. 259) is amended, the principal changes being (1) the premises on which the animals are rested must be provided with protection against the weather throughout the year; (2) the person having control of the premises on which the cattle are rested must observe the conditions set out in Art. 2 (*b*) of this Order, which impose, *inter alia,* new requirements as to the provision of easily accessible and adequate supplies of fodder and water, separate pens to be provided for the segregation of ailing cattle and that not more than 40 cattle are to be detained in any one compartment; (3) cattle may not be loaded into any ship or aircraft unless a veterinary inspector has certified that he has examined the cattle and found them fit to be shipped and (4) that if the master of the vessel anticipates bad weather, cattle are not to be carried on that voyage.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

Food and Drugs

EGGS ORDER, 1957 (S.I. No. 1097): operative June 30, 1957. The Order of 1953 (S.I. No. 529), as amended, is revoked and replaced. Packers are required to mark with approved marks eggs purchased and sold under arrangements with the British Egg Marketing Board, and it is prohibited subsequently to alter, deface or remove such marks. Packers are also required to keep records of their purchases and sales of eggs. The order also supplements the guarantee arrangements for eggs having effect under Part I of the Agricultural Act, 1947.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

EGGS (GUARANTEED PRICES) ORDER, 1957 (S.I. No. 1125): operative June 30, 1957. The Order of 1956 (S.I. 1956, No. 364) is replaced, and provision is made, under Part I of the Agricultural Act, 1947 (10 & 11 Geo. 6, c. 48), for guaranteed prices and an assured market for hen and duck eggs. Packers of such eggs must observe the provision of the Eggs Order, 1957 (see above).

COLOURING MATTER IN FOOD REGULATIONS, 1957 (S.I. No. 1066): operative June 30, 1957; (SCOTLAND) (S.I. No. 1123): operative July 3, 1957. The provisions of the Public Health (Preservatives etc. in Food) Regulations, 1925 (S.R. & O. No. 775), (Scotland) (S.R. & O. No. 814), as amended, are revoked and replaced. The sale or importation of food containing any added colouring matter other than that specified in the First Schedule is prohibited (Regulation 5) (Scotland, Regulation 6). Regulation 6 (Scotland, Reg. 7) prohibits the sale or importation of certain raw and unprocessed foods having, otherwise than for marking purposes, any added colouring matter at all, except that citrus fruit may have permitted colouring if this is suitably indicated as prescribed. Regulation 7 (Scotland, Reg. 8) prohibits the sale or advertising for sale of any food colouring matter which is not a permitted colouring matter, and imposes requirements as to the labelling of permitted colouring matter and colouring and flavouring compounds. Regulation 8 (Scotland, Reg. 9) provides that where certain food is certified by a public analyst as containing colouring matter not permitted by the Regulation, that food may be treated for the purposes of section 9 of the Food and Drugs Act, 1955 (4 & 5 Eliz. 2, c. 16), or the Food and Drugs (Scotland) Act, 1955 (4 & 5 Eliz. 2, c. 30), ([1956] Crim.L.R. 63, 357) as being unfit for human consumption. The Regulations do not apply to food or colouring matter intended for export.

For penalties for contraventions, see Regulation 9, (Scotland, Regulation 10) of the Order.

CONTROL OF HEMP (REVOCATION) ORDER, 1957 (S.I. No. 1079): operative June 30, 1957. The 1953 Order (S.I. No. 1408) (which controlled the spinning, weaving and other processing of manila hemp) is revoked.

London

The following Orders have been made prohibiting waiting: S.I. 1956, Nos. 1120 (Caterham, Surrey); 1121 (Denham, Bucks).

The following Order has been made imposing a 40 m.p.h. speed limit: S.I. No. 1232 (Route A.41, London–Birmingham Trunk Road in the Borough of Hendon).

The following Order has been made restricting the weight of vehicles to be driven on a specified road: S.I. No. 1247 (Ealing).

Mines and Quarries

MINES (EMPLOYMENT OF YOUNG PERSONS) (APPOINTED DAY) ORDER, 1957 (S.I. No. 1093): operative July 1, 1957: COAL MINES (TRAINING) (VARIATION) REGULATIONS, 1957 (S.I. No. 1094): operative July 2, 1957. July 1, 1957, is appointed as the day after which no male young person under 16 may be employed below ground in any class of mine except for the purpose of receiving any instruction specified in regulations which may be made by the Minister under the provision of the Mines and Quarries Act, 1954, s. 124 (2) ([1955] Crim.L.R. 126). The Regulations specify the various descriptions of instruction as (1) any instruction (except practical instruction) in, or in work connected with, mining, given in any part of a mine, and any instruction of a kind mentioned in Regulation 3 (1) of the 1956 Regulations (S.I. 1956, No. 2017; [1956] Crim.L.R. 127) (which describes training for young persons who are under 18 when they begin it). In the case of a person under 16 who has completed the training so described, he may have further instruction of a kind which was, or could have been given, as part of that training, or instruction in safe and efficient methods of working below ground, including practical instruction given (otherwise that at a coal-face except in a mine in the counties of Brecknock, Cardigan, Carmarthen, Glamorgan or Monmouth) in a deputy's district wholly set aside for training purposes. The regulations also include provision with regard to the persons who may give the permitted instruction, provide for the supervision of the young persons when below ground, and for the keeping of records of the training given; and they also specify certain minor and consequential variations of the 1956 regulations.

For penalties for contraventions, see sections 155, 160, 161 and 162 of the Mines and Quarries Act, 1954 ([1955] Crim.L.R. 126).

MINES AND QUARRIES (NOTIFICATION OF DANGEROUS OCCURRENCES) ORDER, 1957 (S.I. No. 1095): operative July 1, 1957. The provisions of section 116 of the principal Act are extended to certain special classes of dangerous occurrences at mines and quarries. The effect of this is that the manager of a mine or owner of a quarry must, when there is such an occurrence at the mine or quarry, give notice thereof to the inspector for the district and to the employees' nominee, whether or not death or serious bodily injury has been caused. The classes of occurrences to which the order relates are specified in art. 2, and arise out of the use at mines or quarries of electricity, blasting materials or similar devices, or the use at mines of coal, ironstone, shale or fireclay or breathing apparatus, smoke helmets or similar apparatus.

For penalties for contraventions, see sections 155, 160, 161 and 162 of the Mines and Quarries Act, 1954 ([1955] Crim.L.R. 126).

Road Traffic

PUBLIC SERVICE VEHICLES (LICENCES AND CERTIFICATES) (AMENDMENT) (NO. 2) REGULATIONS, 1957 (S.I. No. 1118): operative July 15, 1957. The 1952 Regulations (S.I. No. 900) are further amended so as to increase the fee for a public service vehicle licence from £4 to £6 (Regulation 3 (1)) and to increase the fee for a certificate of fitness from £5 to £5 10s. (Regulation 3 (2)).

GOODS VEHICLES (LICENCES AND PROHIBITIONS) (AMENDMENT) REGULATIONS, 1957 (S.I. No. 1119): operative July 15, 1957. The 1952 Regulations (S.I. No. 381) are further amended so as to provide (1) that an authorised vehicle shall carry an identity certificate at all times notwithstanding that for the time being the vehicle is not being used for a purpose for which a carrier's licence is required under the Road and Rail Traffic Act, 1933 (23 & 24 Geo. 5, c. 53); and (2) for an increase in the fees chargeable in respect of the grant or variation of carriers' licences.

For penalties for contraventions, see section 35 of the Road and Rail Traffic Act, 1933.

MOTOR VEHICLES (DRIVING LICENCES) (AMENDMENT) REGULATIONS, 1957 (S.I. No. 1244): operative August 7, 1957. The principal Regulations (S.I. 1950, No. 333) as amended, are further amended. The principal changes are (1) the definition of " licence " in Regulation 3 (1) of the principal Regulations no longer expressly excludes driving licences granted by virtue of the Motor Car (International Circulation) Order 1930, to temporary visitors to

Great Britain who hold International Driving Permits. The latter Order has been revoked by a new 1957 Order (S.I. No. 1074, see below); (2) the provision made in Regulation 4 (2) of the principal Regulations for the submission of simplified forms of application for driving licences by visitors is revoked. By the above-mentioned Order (S.I. No. 1074, see below) visitors to Great Britain who hold driving permits issued abroad may drive here without holding driving licences; (3) Regulation 15 of the principal Regulations no longer dispenses with the requirements of section 5 of the Road Traffic Act, 1930 (which makes provision as to the physical fitness of applicants for licences), in the case of those visitors who apply for driving licences, and makes fresh provision for exempting such visitors in certain circumstances from the requirements to take driving tests.

MOTOR VEHICLES (INTERNATIONAL CIRCULATION) ORDER, 1957 (S.I. No. 1074): operative on a date to be notified in the *London Gazette*. This Order supersedes the previous Orders of 1930 (S.R. & O. No. 968) and 1933 (S.R. & O. No. 46) and gives effect to various Conventions respecting motor vehicles and drivers going abroad from the United Kingdom and coming to Great Britain from abroad. Effect is also given to that part of the Agreement regarding the status of forces of parties to the North Atlantic Treaty (Cmd. 8279) as respects driving permits of members of visiting forces and their civilian components and confers certain privileges, in relation to motor-vehicles, on persons in Great Britain but resident outside the United Kingdom who are not entitled thereto by any international agreement.

The Minister of Transport and Civil Aviation may issue, on payment of fees, international driving permits and documents, and may carry out driving tests and examinations of vehicles for that purpose (Article 1). Article 2 enables persons resident outside the United Kingdom who hold a Convention driving permit or a domestic driving permit to drive certain classes of vehicles, public service vehicles and heavy goods vehicles without holding the licences required under the Road Traffic Act, 1930; and modifies that Act in relation to such persons driving certain heavy motor vehicles whilst under the age of 21 years. Article 2 (4) deals with disqualified drivers. Article 3 makes provision for members and civilian members of visiting forces who hold foreign driving permits, and who are not disqualified, to drive in Great Britain without a driving licence issued under the Road Traffic Act, 1930. Article 5 empowers the Minister by regulations to provide for the issue, by prescribed bodies, of permits for motor vehicles brought temporarily into Great Britain, and for the registration and identification of such vehicles (see S.I. No. 1246, below). By Article 6 (1) a registration mark assigned under s. 16 of the Vehicles (Excise) Act, 1949, to one of these vehicles need not comprise a mark indicating the Council registering the vehicle. Article 6 (2) provides that an application under the Road and Rail Traffic Act, 1933, for a "C" carrier's licence for a motor vehicle or trailer brought temporarily into Great Britain shall be made to the licensing authority for the area where the vehicle is landed. Article 6 (3) enables regulations under the Road Transport Lighting Act, 1927, to vary or grant exemptions from the requirements of that Act in the case of motor vehicles or trailers brought temporarily into Great Britain.

MOTOR VEHICLES (INTERNATIONAL CIRCULATION) REGULATIONS, 1957 (S.I. No. 1246): operative August 7, 1957. The Regulations of 1941 (S.R. & O. 1941, No. 1219), the amending Regulations set out in Third Schedule and Regulation 14 (2) of the Road Vehicles (Registration and Licensing) Regulations, 1955 (S.I. No. 1664), are superseded. Regulations 1 and 2 provide for the grant of international circulation permits by registration authorities, and the maximum period for which these may be granted. Certain provisions of the Road Vehicles (Registration and Licensing) Regulations, 1955 (S.I. No. 1664), relating to excise licences, are applied to such permits (Regulation 3). The permits are surrendered to registration authorities, or in specified circumstances to Councils as defined in Regulation 10 (Regulation 4). Regulation 8 requires registration authorities on issuing a permit to record certain particulars and to forward them to the London County Council, who in turn are required to preserve those particulars and to furnish them to certain authorities and persons if requested so to do.

MOTOR VEHICLES (INTERNATIONAL MOTOR INSURANCE CARD) (AMENDMENT) REGULATIONS, 1957 (S.I. No. 1245): operative August 7, 1957. The principal Regulations (S.I. 1957, No. 891) are amended by providing for registration authorities to record the particulars as to the motor insurance cards, and by dispensing with the need for visitors to sign these particulars.

Scotland

Food and drugs: see p. 626, above.

Theatre and Cinematograph

CINEMATOGRAPH FILMS (REGISTRATION) (AMENDMENT) REGULATIONS, 1957 (S.I. No. 1199): operative July 15, 1957. (EXHIBITORS)

(AMENDMENTS) REGULATIONS, 1957 (S.I. No. 1200): operative October 1, 1957. The principal Regulations (S.I. 1948 Nos. 634 and 1831) as amended, are further amended so as to increase the fees payable on an application for the registration of a film; to revise the qualifications of the accountant who may verify the particulars of labour costs in paragraph 8 of Registration Form C; and to increase the fee payable for an exhibitor's licence.

For penalties for contravention see section 4 of the Cinematograph Films Act, 1957.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

35. *Road Traffic offences: aiding and abetting*

A great deal of controversy has arisen here over the power now vested in Sheriffs to disqualify persons found guilty of aiding and abetting offences under sections 11 and 15 of the Road Traffic Act, 1930.

Some contend that under section 26 (3) of the Road Traffic Act, 1956, a Sheriff no longer has power to disqualify for the offences stated in the previous paragraph. While agreeing that the wording of the section is rather ambiguous my interpretation is that it is now no longer compulsory to disqualify, but under section 6 (1) of the Road Traffic Act, 1930, a Sheriff still has power to disqualify if he thinks fit—in short, the power to disqualify is still there but no longer compulsory.

I would be very grateful if you could clarify this matter. [D. M. C.]

ANSWER

The wording of section 26 (3) of the Road Traffic Act, 1956, is somewhat ambiguous at first sight but the effect is, undoubtedly, to remove the obligatory duty to disqualify persons found guilty of aiding and abetting offences under sections 11 and 15 of the

Road Traffic Act, 1930. The sheriff does, however, retain his discretionary power to disqualify under section 6 (1) of the Act of 1930 in cases where he thinks it fit to do so. In short, the change effected by the new Act is to substitute a discretionary power for the former compulsory duty to disqualify for aiding and abetting the offences referred to. [F. M. D.]

Letters to the Editor

Postponement of Sentence

Sir,

At [1957] Crim.L.R. 316 you publish a note of some remarks made by the Lord Chief Justice on the practice of postponing sentence. In view of what he is there reported to have said it is of interest to recall his remarks in *Easterling* (1946) 32 Cr.App.R. 5, where the chairman of quarter sessions had postponed sentence without giving reasons.

Here, also, the postponement was strongly disapproved of, but with the interesting qualification " unless there is something to be gained by it." An example was then given of what might be gained: " It may be that on conviction a prisoner will offer to take steps to restore stolen property or to give some information. The court might then say that that was a good reason for postponing sentence, and that they would see what happened between those sessions and the next sessions."

It would be useful to know the limits of the doctrine of " something to be gained."

Yours faithfully,

C. HOWARD.

Enfield, Middlesex.

Books and Periodicals

Reviews:

The Road to Tyburn. By Christopher Hibbert. London: Longmans, Green & Co., Ltd. 1957. 149 and (bibliography, glossary and index) 12 pp. (16s. net.)

This biography of Jack Shepherd, one of the kings of the eighteenth-century underworld, throws a vivid and sometimes gruesome light on the life of London at that time. But, however horrified the reader may be at the tales of Newgate and the scenes at public executions, this book is one which it is difficult to put down until the final scene at Tyburn, when Shepherd, hopeful until the last of making one of his famous escapes, is himself hanged amid scenes of almost universal regret. For the hero has many of the lovable characteristics of what is termed " a young rascal," and in tracing his somewhat hair-raising career of thieving and gin drinking, the author is able to elaborate on many aspects of London society—the lives of the wretched apprentices, the state of the prisons and of the first tentative efforts made to suppress organised crime, as personified by the cunning and eminently successful Jonathan Wild.

After an execution the hangman held an alehouse party in Fleet Street we are told, and there sold his rope for sixpence per inch—with this and other such interesting tit-bits of information Christopher Hibbert makes *The Road to Tyburn* instructive and at the same time entertaining reading.

D. E. W.

Battle for the Mind. A Physiology of conversion and brain-washing. By William Sargant. London: Heinemann. 1957. xxiv and 236 and (bibliography and index) 12 pp. (25s. net.)

This is a notable book. It presents in unique manner a tremendous amount of provocative and intensely interesting topical material with its historical antecedents. The subject-matter concerns the effect of religious conversion and its sinister shadow, brain-washing, upon the individual—and groups.

The author, widely known for his work on physical methods of treatment in psychiatry, gives a fascinating historical survey of the ways in which men's patterns of thought and feeling have been altered by others, with a message, through the ages. Parallels are drawn between the effects of the religious mysteries of ancient Greece, modern revivals and present-day brain-washings in Russia and China. Robert Graves has contributed an impressive account of the fear, excitement and mystical effects of the descent to the oracle of Trophonius. This tremendous, shattering experience had, apparently, lasting mental effects that became proverbial in the popular thought of the time.

A great deal of the book is taken up with a detailed study of

John Wesley and his technique of securing religious conversions—he is shown to have been a forerunner of present-day indoctrination.

This book has been based on Pavlovian concepts, and the section on Pavlov's work is delightfully clear and explicit. But are we just a mass of conditioned reflexes? Many will say that the reality of the unconscious is a fact that cannot be excluded from any scientific study—physiological or otherwise. It is remarkable that Pavlov's dogs lost their indoctrination so thoroughly under stress—a pointer to alterability of effect.

Your reviewer has for many years followed much of Dr. Sargant's teaching in the application of physical methods. Sargant has done possibly more than any man to stimulate, enliven and invoke progressiveness in psychiatric practice.

This splendid book would be greatly increased in authority and balance, if the views of practising analysts were included. The statement that analysis is often only considered complete when the therapist's point of view has been thoroughly absorbed is quite out of keeping with the Jungian viewpoint and its insistence upon the fullest development of the individual as a unique being. Their view is that neurosis is Nature's attempt to heal and that it is the doctor's province to travel with the patient on his sometimes perilous journey to self-knowledge.

Jung says: "At best the patient should come out of analysis as he actually is—in harmony with himself, neither good nor bad, but as man truly is—a natural being."

Whether we like it or not, psychoanalytic thought has permeated our daily life; and the analytical psychology of Jung is still a developing force, ahead of his time. It has much light to throw on the nature of personality changes. He has described *psychological* types and how they react; his concept of the collective unconscious throws light upon the behaviour of individuals under social pressures.

"The spiritual adventure of our time," Jung writes, "is the surrender of human consciousness to what is undetermined and undeterminable . . . for thousands of years rites of initiation have been teaching spiritual rebirth, yet strangely enough man forgets again and again the meaning of divine procreation."

There is no mention in Dr. Sargant's book of the diminishing popularity of pre-frontal leucotomy and of the grave doubts that assail many doctors regarding insulin treatment, which by its very nature is time-consuming and dangerous (let me emphasise that your reviewer believes it to be a most valuable treatment but other views must be considered).

It is common experience that electrical treatment which is near miraculous in accurately selected cases is far from precise or predictable when used on a wider basis and that relapse is common.

It remains a melancholy fact that in spite of the great advances pioneered by men such as Sargant, mental disorder remains the greatest clinical problem today. If brain-washing can be turned to more positive, controllable, reproduceable clinical use, this book will have helped.

It is to be hoped that the next edition will contain something of American and English reports of the after-effects of brain-washing upon service personnel. It is interesting to speculate upon what happens to the washers as well as to the washed. It cannot be possible for human beings to apply these procedures and go blithely unaltered.

This book with its emphasis on forcible alteration and destruction of personality through psychological and physiological anguish cannot fail to disturb. Happily, it contains positive ideas regarding the preservation of integrity—notably the account of Colonel R. H. Stevens's survival. With such an example it is clear that the human spirit is not merely a matter of physiology.

A. G.

Books Received:

Cockle's Cases and Statutes on Evidence. Ninth edition by G. D. Nokes. London: Sweet & Maxwell, Ltd. 1957. 495 and (index) 16 pp. (42s. net.)

The Sentence on the Guilty. By Claud Mullins. London: Justice of the Peace, Ltd. 1957. 66 and (index) 4 pp. (9s. 6d. net.)

Readers' Digest:

Children and young persons. Magisterial policy in the London Juvenile Courts: 8 *British Journal of Delinquency,* No. 1, p. 13.

Children and young persons: Juvenile prostitution: 8 *British Journal of Delinquency,* No. 1, p. 3.

Homicide: A Scottish commentary on the Homicide Act, 1957: 1957 *Scots Law Times* 129.

Homicide: Doctor in court: *The Spectator,* July 19, 1957.

Judges' rules: Administering a caution: 121 *Justice of the Peace* 423.

Licensing law: Section 100 of the Licensing Act, 1953: 65 *Police Review* 491.

Police: Aspects of interrogation: 65 *Police Review* 500, 518, 536, 554.

Road traffic: Dangerous and careless driving—the standard of proof: 65 *Police Review* 502.

Road traffic: Reception order following second conviction for dangerous driving: 121 *Justice of the Peace* 424.

THE
CRIMINAL LAW
REVIEW

Editors

JOHN BURKE and PETER ALLSOP, M.A.

Barristers-at-Law

Editorial

The Davenport Case

The case of *R.* v. *Davenport*[1] raised interesting questions as to the principles of the felonies of embezzlement and larceny by a servant and the misdemeanour of fraudulent conversion. In [1956] Crim.L.R. 589, 659 and 730, Mr. J. W. C. Turner criticised the view expounded by Mr. J. C. Smith at 19 *Modern Law Review* 39. After further consideration Mr. Smith has written another article, the first part of which we publish at p. 640 below.

Report of the Committee on Homosexual Offences and Prostitution

The Wolfenden Committee, appointed in August, 1954, has issued its report,[2] which is summarised below at p. 665. The Howard League for Penal Reform is holding a conference to consider the report at the Old Hall, Lincoln's Inn, on Saturday, October 12. The conference will consider the law relating to homosexual offences at the morning conference between 10 a.m. and 12.30 p.m., and prostitution will be discussed at the afternoon conference between 2 p.m. and 4.30 p.m. Admission is by ticket only.[3] Further information and tickets are obtainable from: The Howard League for Penal Reform, Parliament Mansions, Abbey Orchard Street, S.W.1.

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[1] (1954) 38 Cr.App.R. 37.

[2] Cmnd. 247. Published by the Stationery Office (5s. net).

[3] Members: 3s. all day; 2s. one session only; non-members: 3s. 6d. all day; 2s. 6d. one session only. Please send stamped addressed envelope.

Borstal accommodation

The number of committals to Borstal training has risen so sharply since the end of 1956 that the institutions are full to capacity and additional accommodation cannot be provided at short notice. As a result boys have been kept in prison waiting for vacancies.[4] To relieve the situation a separate wing of Stafford Prison has been set aside for boys who are waiting to go to Borstal reception centres. They are to be kept apart from the adult prisoners and provided with a suitable regime under a " specially selected staff " of prison officers. The routine will include physical exercise, school classes, and the usual workshop work.

Employers' " private court "

When Mr. William McAllister pleaded guilty to stealing as a servant 5 cwt. of pig meal from his employer, his legal representative described the case as " most sinister." The reason for this adjective was that the employers, having discovered the theft, gave McAllister the choice of paying £50, which would be given to an agreed charity, or being reported to the police. About £19 had been paid to the employers. The chairman of the bench said that, in view of what the magistrates had heard, a nominal fine of £1 would be imposed.

No cell available

When the chairman of the Newcastle-on-Tyne bench said that the magistrates had decided to sentence Brian Purcell, a company director, to four days' detention in a police cell he was told by the local police superintendent that the cells at Gosforth police station had not received Home Office approval. The sentence, which had been imposed, in addition to a heavy fine, for driving while disqualified and driving while uninsured, was remitted.

Repeat performance

After the case, noted at [1957] Crim.L.R. 546, of the two gangs breaking into the same shop, we now have the case of the thief who broke into the same flat twice, with results equally disastrous to himself. Harold Roy Webb, who was nicknamed " Rubberbones " after escaping from Dartmoor Prison through a narrow air duct in 1951, was sentenced to two years' imprisonment for twice breaking into a flat in Deptford Broadway; stealing property worth

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[4] See [1957] Crim.L.R. 565.

£75 on the first occasion; being in possession of housebreaking implements by night; and breaking into a factory with the intent to steal.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

The Davenport Case

By J. C. Smith

In his article, "*The Davenport Case*" [1956] Crim.L.R. 589, 659 and 730, Mr. J. W. C. Turner argues that a servant can commit embezzlement only of property which he has received while engaged in performing the duties of his service; or, as Kenny puts it (*Outlines of Criminal Law* (16th ed. by J. W. C. Turner), 265) that he "cannot embezzle anything which he obtained by doing an act that was outside the authorised scope of his employment." Earlier articles [1] had attempted to show that Kenny's proposition was inconsistent with the cases of *R.* v. *Gale* (1876) 2 Q.B.D. 141 and *R.* v. *Davenport* (1954) 38 Cr.App.R. 37. This article will attempt to vindicate the view advanced in 19 M.L.R. 39 that, where the property received is owned by the master, the servant may be convicted of embezzlement, notwithstanding that the receipt was outside the scope of his employment. It should be emphasised at the outset that, in this discussion, we are concerned, as Mr. Turner has pointed out ([1956] Crim.L.R. 592), only with the actual and not with the ostensible authority of the servant.

The facts of *Gale* and *Davenport* must be briefly repeated. Gale was the head manager of an insurance company. It was his duty to receive at the chief office cheques sent by the managers of the provincial offices, to indorse them if they were payable to his order, and to hand them to the company's cashier, who paid them into the company's bank and accounted for them in the company's books. Gale received two cheques payable to his own order from branch managers and, instead of handing them to the cashier, cashed both through private friends of his own, who gave him cash and paid the cheques into their banks. Gale then applied the money to his own use. It was held by the Court for Crown Cases Reserved that he was guilty of embezzlement of the money.

Davenport was the secretary of a company. He was given blank cheques, signed by two directors of the company, which it was his duty to countersign and pay to those persons to whom the company wished to make payments. He disposed of three cheques by handing them to one Samuel, made out to Samuel's bank in return for cash and open cheques which he cashed. He was convicted of larceny of the money so received but the Court of Criminal Appeal, following *Gale*, substituted a conviction of embezzlement.

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[1] Rupert Cross, "The Definition of Embezzlement" [1955] Crim.L.R. 734, and J. C. Smith, "Embezzlement and the Disobedient Servant," 19 M.L.R. 39.

Mr. Turner's argument is that *Davenport* is wrong but he accepts *Gale* as a sound decision and attempts to distinguish it. According to his view, Gale was, but Davenport was not, acting within the authorised scope of his employment in cashing the cheque. The basis of the distinction made is that in *Davenport* the servant stole and forged the cheques which he subsequently cashed, but that there was no such larceny or forgery in *Gale*. The presence of forgery in the one case and its absence in the other were pointed out in 19 M.L.R. 39, 42 but it was argued that this distinction was irrelevant to the theory there advanced. Mr. Turner argues: " there was no forgery whatever in *R.* v. *Gale,* and no crime at all except in the retention of the money after Gale had received it, when the crime with which he was charged, embezzlement, was achieved." [2] This is, with respect, a most surprising proposition in view of the second sentence of Cockburn C.J.'s judgment in *Gale*: " On the face of the case, there can be no doubt that *the prisoner might have been convicted of embezzling the cheques*." [3] In fact, Gale was guilty of a crime before he wrongfully retained the proceeds. Throughout his article Mr. Turner ignores this sentence in Cockburn C.J.'s judgment and this, it is respectfully submitted, invalidates the whole of his argument. To maintain that Gale was acting in the course of his employment is to ignore not only this unequivocal statement in the leading judgment but also the trial judge's statement of the facts of the case:—

> " . . . the managers of the provincial offices remitted cash or cheques to the prisoner as chief manager, which it was the duty of the prisoner to hand on receipt to the cashier, and in the case of cheques it was the duty of the prisoner to indorse them if they were payable to his order, and they were then paid into the company's bankers by the cashier, and accounted for in the books."

We are told by the trial judge that it was the prisoner's duty to indorse the cheques and hand them to the cashier. He indorsed them and cashed them with his friends and Cockburn C.J. tells us that this was an act of embezzlement of his master's cheques. Yet Mr. Turner maintains that, in cashing the cheques and receiving the money, he was acting within the authorised scope of his employment!

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[2] [1956] Crim.L.R. 602.

[3] (My italics.) Cockburn C.J. had expressed the opinion in an earlier case that a servant might be guilty of embezzling money which he had obtained by committing a felony against his master. In *R.* v. *Keena* (1868) 11 Cox 123 he said: " . . . if a servant receives a cheque for his master and fraudulently appropriates it to his own use and converts it into cash, it is sufficient to allege and prove that he either embezzled the cheque or the money."

"Can it be reasonably maintained," asks Mr. Turner, "that a servant when engaged in committing crimes of forgery and obtaining money from a bank on forged instruments is acting within the scope of his employment as servant?"[4] The answer is: No; and no more reasonably can it be maintained that a servant when committing the crime of embezzlement of his master's cheques is acting within the scope of his employment. ". . . it would be contrary to plain sense," says Mr. Turner, "to maintain that when a servant commits a crime against his master, that conduct could possibly fall within the terms of his service to his master."[5] Agreed: and does not this show that, in the opinion of Cockburn C.J., Gale, in cashing the cheques, was not acting within the terms of his service to his master? If *Gale* is to be taken as good law it must either be accepted that a servant is acting within the authorised scope of his employment in embezzling his master's cheque; or it must be admitted that a servant can embezzle property which he has obtained by an act outside the authorised scope of his employment.

Admittedly, Cockburn C.J.'s statement that Gale could have been convicted of embezzling the cheques is only a dictum; but it is a dictum which cannot be ignored when trying to find out whether the court considered that the accused, when he cashed the cheques, was engaged in performing the duties of his service; for, it is submitted, it shows very plainly that the court thought he was acting outside those duties. Indeed, Pollock B. said so, in so many words, for he is reported in 13 Cox 340, 344 to have said: "The words 'or by virtue of such employment' which were in the previous statute of embezzlement the 7 & 8 Geo. 4, c. 29, s. 47, were omitted in the recent statute, with the view of meeting cases where the money was obtained, *not by virtue of the employment, but, as here, on account of the master*."[6]

Mr. Turner, in his attempt to show that Gale was acting in the course of his employment, quotes Cockburn C.J.'s dictum: "It is the same case as if, being on his way to cash the cheques, he had met a friend in the street who cashed them for him, to save him the trouble of going to the bank." Mr. Turner apparently thinks that the Chief Justice considered this hypothetical case to be on all fours with the case before him. It is submitted that this was not so.

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[4] [1956] Crim.L.R. 602.

[5] *Ibid.*, 603.

[6] My italics.

Cockburn C.J. put this case for one purpose only: to rebut the argument of defending counsel that Gale could not have received the money on account of his masters, because the persons who gave him the money knew nothing of his masters. That Cockburn C.J. did not consider the example as on all fours in all respects with the case before him is sufficiently shown by the fact that he thought that Gale had already embezzled the cheques. The accused did not raise the defence that he was acting outside the duties of his employment in cashing the cheques; and, if the court would not have regarded that as a defence anyway (as, it is submitted, it would not), it was immaterial for the purpose of the Chief Justice's example whether the person in that example was acting within or outside the scope of his employment.

No one denies, of course, that it was Gale's duty to pay over the proceeds of the cheques, when received, to his master. What is denied is that he was performing the duties of a servant when cashing the cheques and receiving the proceeds.

Is R. v. *Gale distinguishable from R.* v. *Davenport*?

Mr. Turner attempts [7] to distinguish Gale on four grounds:

(i) " Davenport's dishonest actions began when he took the three cheque forms (so called cheques) in hand for his own purposes. . . ." Davenport undoubtedly committed larceny as a servant of these forms and forgery of them. But this is no distinction at all as soon as it is remembered that Gale's dishonest actions equally began when he took the cheques in hand for his own purposes; he was guilty of embezzlement of them.

(ii) Davenport's duty was to complete the cheque forms and transmit the cheques to the appropriate payees. " It was completely outside the scope of his duty to his masters to use *these* cheques in any other way. . . . He was not, as servant, engaged in any task of acquisition of money for his masters as was Gale, who as we have seen, was treated by the court on the facts before them as a person who received into his possession money whether in the form of valid cheques or cash which was on its course of passing to his masters." This point has been considered above and it has been shown that it was equally completely outside the scope of Gale's duty to use the cheques in the way he did; and that Gale was not " engaged in any task of acquisition of money for his masters," but, on the contrary, was engaged in embezzling his masters' cheque. In what sense the money in *Gale* could be said to be " on its course of passing to his masters " when the payer did not know of the existence of the masters and the payee intended to use the money for his own purposes, it is difficult to conceive.

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[7] [1956] Crim.L.R. 660.

(iii) " Davenport was in the position of thief, who having stolen property from X, has sold or exchanged it for other property. . . . [The money or chattel which the thief so acquires] is neither *transferred* to the thief by the transferor for the account of the victim, nor is it *received* by the thief for the account of the victim." But Gale also was in the position of a thief, who having stolen[8] the property of X, has sold or exchanged it for other property. The money which Gale received was not transferred to him by the transferor for the account of the victim. Whether it was received by Gale " for or on account of " the victim is the very question in dispute. But Gale did not *intend* to receive for or on account of the victim any more than Davenport. If either of them did so, it was because of some obligation imposed upon him by a rule of law.

(iv) " . . . Samuel was the owner of the open cheques and cash which he handed to Davenport. . . . There is no particle of evidence that this money was intended, either by the bank or by Samuel to go to Davenport's masters." Equally the person who handed the money to Gale was the owner of it and did not intend it for Gale's masters.

Mr. Turner's conclusion is that if " Davenport's conviction of embezzlement is to be justified it follows that some other basis must be found for it than *R.* v. *Gale*." It is submitted, with respect, however, that there is no substance in any of the supposed distinctions drawn between the two cases by Mr. Turner and that *Gale* is indistinguishable from *Davenport*.

Embezzlement and Taylor v. *Plumer*

In 19 M.L.R. 39 it was argued that, where a servant receives from a third party property which is, or becomes on receipt by the servant, the property of the master, then that servant receives the property " for or on account of " his master ; and that, where this is so, it is immaterial for the purposes of embezzlement that the servant is acting outside his authority and contrary to his master's instructions.[9] The decisions in *Gale* and *Davenport* were then justified by invoking the case of *Taylor* v. *Plumer* (1815) 3 M. & S.

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[8] The Larceny Act, 1861, provided that the servant who embezzled his master's property " shall be deemed to have feloniously *stolen* the same from his master or employer."

[9] It was not intended to assert that embezzlement could *never* be committed unless ownership was in the master, but only that, where the servant was acting outside his authority in receiving the property, the fact that it was owned by the master was sufficient to impose upon the servant such a duty that he received it on account of his master. The proposition quoted by

562 which, it was contended, established the principle that where an agent wrongfully converts his principal's property into another form the legal ownership in the property in its new form vests in the principal.

In both *Gale* and *Davenport* the master's cheque was converted into money and, it was argued, that money, being the master's money, was received for or on account of the master. *R.* v. *Wilson* (1839) 9 C. & P. 27 (where a servant wrongfully sold his master's goods and was acquitted of embezzling the proceeds) and *R.* v. *Aitken* (1883) C.C.C.Sess.Pap. XCVII 336 (where a servant forged and wrongfully cashed his master's cheque and was acquitted of embezzling the proceeds) are inconsistent with this principle. *Aitken*, at least, quite clearly cannot stand with *Davenport.* It was, therefore, argued that these two cases (both first instance rulings by recorders) are wrong. *Snowley* (1830) 4 C. & P. 390, *Harris* (1854) Dears. 344 and *Cullum* (1873) L.R. 2 C.C.R. 28 (in all of which servants earned money by misusing their masters' profit earning chattels—a stallion, a mill and a barge—and were acquitted of embezzling the profit so made), on the other hand, are all consistent with this principle. In such cases, though the master is entitled to recover an equivalent sum in an action at law for money had and received (*Morison* v. *Thompson* (1874) L.R. 9 Q.B. 480), the actual money received is the property of the servant (*Lister* v. *Stubbs* (1890) 45 Ch.D. 1).

Mr. Turner challenges this interpretation of *Taylor* v. *Plumer* so that case must now be examined. On December 5, 1811, Sir Thomas Plumer gave a stockbroker, Walsh, a draft for £22,200 which he directed him to lay out in the purchase of exchequer bills. Walsh cashed the draft but purchased exchequer bills to the amount of only £6,500. With the balance of the money he fraudulently purchased American share certificates and a quantity of bullion with which he absconded, intending to go to America. He was, however, overtaken by Plumer's attorney at Falmouth on December 9 and he then surrendered the property and executed a deed purporting [10] to

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Mr. Turner ([1956] Crim.L.R. 662) from 19 M.L.R. 44 is admittedly too wide when taken from its context but it was written with reference to *disobedient* servants. It is agreed that, if a servant is acting within the scope of his authority, he can embezzle property which is not owned by his master. Thus if A, intending to make B a bailee of a certain chattel, were to deliver the chattel to B's servant, who received it in the course of his duty, it is conceived that a fraudulent misappropriation by the servant would be embezzlement, notwithstanding that the property would not be in the master.

[10] The purported assignment, occurring after the act of bankruptcy, was void by statute: 1 Jac. 1, c. 15, s. 5. There is, therefore, no substance in Mr. Turner's suggestion ([1956] Crim.L.R. 669) that Plumer became the legal owner by virtue of this purported transfer.

assign it to Plumer on trust to sell it and recoup his losses out of the proceeds. Now Walsh had committed an act of bankruptcy on December 5 and his assignees brought an action of trover for the share certificates and the bullion. The action failed on the ground that Plumer, in taking the certificates and the bullion, had simply "repossessed himself of that, of which . . . he never ceased to be the lawful proprietor."

Mr. Turner contends that in *Taylor* v. *Plumer* the court was not concerned with legal ownership but with the beneficial interests in the property which Plumer had recovered in its changed form from Walsh. "The case," he says, "from beginning to end went on the footing that there was a trust, and that relief would be available in equity so that the equitable rules as to the following of the trust property would apply." [11] If this were so, the case would certainly have no bearing on the crime of embezzlement but, with great respect, it cannot be accepted. *Taylor* v. *Plumer* was a case at common law, sixty years before the Judicature Acts. It has always subsequently been treated as defining the limits of the common law right to follow money, a right which, because of its shortcomings, has been supplemented by equity. The attitude of the common law courts is clearly stated by Lord Greene M.R., delivering the judgment of the Court of Appeal in *Re Diplock* [1948] Ch. 465, 519:—

> "The common law did not recognise equitable claims to property, whether money or any other form of property. Sovereigns in A's pocket either belonged in law to A or they belonged in law to B. The idea that they could belong in law to A and that they should nevertheless be treated as belonging to B was entirely foreign to the common law. This is the

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[11] [1956] Crim.L.R. 668. This opinion is directly contrary to that of Lord Wright expressed in his article, "*Sinclair* v. *Brougham*," 6 C.L.J. 305, 309. Lord Wright, discussing cases where the plaintiff's property has become mixed with that of the defendant, says: "there cannot in general be equitable property unless there is legal property in the defendant, only the equitable property being in the plaintiff, whereas in the *Taylor* v. *Plumer* type of case, *the legal property remains in the plaintiff*." (My italics.) See also Viscount Haldane in *Sinclair* v. *Brougham* [1914] A.C. 398, 420. "[The right at law] appears to me to cover all cases where the property in the money has not passed, and the money itself can be earmarked in the hands of the person who has wrongfully obtained it. . . . [The common law] looked simply to the question whether the property had passed. . . ." It is not denied that the nature of common law right to follow property was influenced by the equitable rules; but once the right was given by a common law court, it became a common law right. The common law courts did not enforce merely equitable rights. Thus in *Scott* v. *Surman* (1742) Willes 400, Willes C.J. said: "Wherever the equity of the case is clearly with the plaintiff, I will always endeavour, if I can, and if it be any ways consistent with the rules of law, to give him relief at law. . . . But to be sure no motive whatever is sufficient to warrant our determining contrary to law."

> reason why the common law finds its typical exemplification in cases of principal and agent. If B, a principal, hands cash to A, his agent, in order that it may be applied in a particular manner, the cash, in the eyes of the common law, remains the property of B. If, therefore, A, instead of applying it in the authorised manner, buries it in a sack in his garden or uses it for an unauthorised purchase, B can, in the former case, recover the cash as being still his own property and in the latter case, affirm the purchase of something bought with his money by his agent."

It is true that in *Taylor* v. *Plumer* Lord Ellenborough describes the property as "covered with a trust in favour of the principal," but it is submitted that a study of the judgment makes it clear that he does not mean that there was a "trust" in the modern, technical sense of that word. He is concerned throughout with the question of the ownership of "the property of a principal entrusted by him to his factor" for some special purpose. In such cases the factor does not usually become the legal owner, but is generally only a bailee. Lord Ellenborough speaks of "*trust property* in the possession of a factor empowered to dispose of it for his principal," when referring to *L'Apostre* v. *Le Plaistrier,* 2 Eq.Ca.Abr. 113n. which was an action of trover before Holt C.J. against the assignees of a bankrupt, to whom the plaintiff had delivered diamonds "with a bare authority to sell them for the plaintiff's use." In this context "trust property" simply means "property entrusted" and property bailed is property entrusted. Professor Hanbury remarks (40 L.Q.R. 31, 38) of Lord Ellenborough's judgment: "It is, perhaps, unfortunate that the word 'trust' should have been used, for a sort of equitable veil is thus cast over a clear common law principle." It is respectfully submitted that Mr. Turner's view of the case has been obscured by this veil.

Mr. Turner contends that the principal's right in *Taylor* v. *Plumer* depended upon the fiduciary element, the "trusts" which existed in favour of Plumer. But it has been held that "the common law right of following property depends in no degree upon the existence of any fiduciary relationship" (*per* Wynn Parry J. in *Re Diplock* [1947] Ch. 716, 746, approved on this point by the Court of Appeal [1948] Ch. 465, 519). Viscount Haldane L.C. has said that the right extends to stolen property (*Sinclair* v. *Brougham* [1914] A.C. 398, 420), and there is certainly no fiduciary relationship between the thief and his victim. Mr. Turner points out that the common law allowed the principal only "an action for money, etc., had and received, an action *in personam*." [12] But this does not show that the principal was not the legal owner, for the common law did not allow an action *in rem* even to the legal owner of personal property. If Mr. Turner is contending that the principal had no legal right in the specific property, this, with respect, cannot be supported. The defendant in *Taylor* v. *Plumer* actually took possession of the property in dispute and was allowed by a common law court to retain it as his own. If A has a mere "action *in personam* for compensation, on a basis of unjust enrichment" [13] against B that certainly does not entitle him to seize any particular property of B, and to do so would be a conversion. In *Taylor* v. *Plumer* the action failed because the defendant had a right to take the specific property.[14] To quote Professor Hanbury (*op. cit.*) again: "The act of the principal in retaking his money in the form into which it had been turned by the unauthorised and wrongful act of his agent was justified, not by any right *in personam* of his against the latter as trustee, but by his right *in rem*, his ownership. Such ownership only ceases when the subject of it ceases to be earmarked and ascertainable."

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[12] *Ibid.* 669. Yet it seems that an action in trover would lie where the money was earmarked; *cf.* Hanbury, 40 L.Q.R. 37; Denning, 65 L.Q.R. 37.

It is certainly true that a plaintiff may have an action for money had and received when he has no right in respect of any specific identifiable property. *Morison* v. *Thompson* (1874) L.R. 9 Q.B. 480 (where the plaintiff recovered a secret commission received by his agent when negotiating the sale to the plaintiff of a particular ship) was such a case. This was subsequently made clear by *Lister* v. *Stubbs* (1890) 45 Ch.D. 1; but that Plumer had a right at law superior to that of the plaintiff in *Morison* v. *Thompson* was indicated by Stirling J. in *Lister* v. *Stubbs*:—

> "No doubt the case might have arisen (as in *Taylor* v. *Plumer*) at law of following the money; but *Morison* v. *Thompson* was not that case, and no authority has been cited to me in which at law money received under such circumstances has been followed."

In *Lister* v. *Stubbs* Stirling J. and the Court of Appeal held that an agent who takes a secret commission for transacting his principal's business is merely accountable as a debtor and that the principal has no claim to the commission, or the property in which it has been invested *in specie*. There can be little doubt that if the circumstances had been like *Taylor* v. *Plumer* instead of like

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[13] *Ibid.* 668.

[14] Plumer's success did not depend on the fact that he had actually recovered possession. If the assignees had been in possession Lord Ellenborough would have allowed Plumer to recover from them: ". . . if an action were brought against them, the assignees, by the defendant, they could not have effectually retained against him."

Morison v. *Thompson* Stirling J. would have decided the case differently.

In *Re Diplock* the claims which were based on the doctrine of *Taylor* v. *Plumer* and its equitable extensions were considered by both Wynn Parry J. and the Court of Appeal to be based on rights *in rem*. Wynn Parry J. said that the right of the owner of an asset to follow that asset into whosoever hands it may come, and notwithstanding that it may change its form, is " essentially a right *in rem*." Mr. Turner stresses the view that the principal's right to take the property in its changed form depends on a " waiver of the tort " and a ratification of the unauthorised dealings of the agent. This, however, is the merest fiction and is really inconsistent with *Taylor* v. *Plumer* itself where—as indeed, Mr. Turner points out—Lord Ellenborough said there was no adoption or ratification of the transaction. The opinion of Lord Denning [15] is: —

> " It may . . . be taken as settled that at common law the true owner was entitled, if he wished, to follow money or goods with their product and to claim the product as his own: and this principle exists on its own force and not on any supposed ratification."

It is therefore submitted that *Taylor* v. *Plumer* decided that, at common law, a principal who has entrusted property to an agent is entitled to take back that property, as his own, no matter into what form it may have been converted, provided only that he can identify it. The principal is absolutely entitled to that property as against the whole world—and what is that but common law ownership?

Mr. Turner says that *Taylor* v. *Plumer* and the cases associated with it have no proper connection with the criminal law. But the criminal law is very closely involved with questions of the ownership and possession of chattels and guidance as to the rules relating to these must necessarily be sought in the civil cases. If *Taylor* v. *Plumer* involved only equitable rights, it would certainly have nothing to do with larceny and embezzlement; but if, as is submitted above, it is concerned with legal ownership, it has a great deal to do with them. The case has, moreover, been invoked by some of the judges in at least one criminal case. In *R.* v. *Bunkall* (1864) L. & C. 371 the prisoner was entrusted by the prosecutor with money to buy coals. He bought the coals and the court apparently assumed that he bought them with the very money given to him by the prosecutor. He then converted some of the coals to his own use. He was convicted of larceny and, on a case reserved, held properly so, on the ground that he was a bailee of the coals. Willes J. quoted *Taylor* v. *Plumer* in argument with the object of showing that the coals, when purchased, became the property of the prosecutor. Cockburn C.J., delivering the judgment of the court, said that some members thought a specific appropriation of the coals by the prisoner to the prosecutor was necessary in order to constitute a bailment; and that there was evidence of such an appropriation. Other members, however, thought that "even if there was no evidence of any specific appropriation of the coals by the prisoner to the prosecutor, yet as they were bought with the prosecutor's money given by him to the prisoner for that purpose, that would *ipso facto* vest the property of the coals in the prosecutor, and so there would be a bailment within the terms of the statute." This was obviously a straightforward application by some of the judges of the Court for Crown Cases Reserved, of the principle of *Taylor* v. *Plumer* to a criminal case.

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[15] " The Recovery of Money " (1949) 65 L.Q.R. 37, 42.

Similar results have been arrived at in two other cases, though no reference was made to *Taylor* v. *Plumer*. In *R.* v. *De Banks* (1884) 13 Q.B.D. 29 the prisoner was entrusted with the prosecutor's mare to sell her. He did so and misappropriated the proceeds. It was held, Stephen J. dissenting, that he was guilty of larceny as a bailee of the money. In *R.* v. *Governor of Holloway Prison, ex parte George* (1879) 18 Cox 631, George was entrusted by the prosecutrix with a bond with authority and instructions to obtain a loan for her. He obtained the loan and appropriated it to his own use. It was held, following *De Banks,* that he was guilty of larceny as a bailee. There is no indication in the reports that the buyer of the horse or the lender of the money knew of the existence of the prosecutor in either case. Yet in each case it must have been held that the property in the money when received was in the prosecutor. If the payer of the money did not intend it for the prosecutor, the payee certainly did not. How, then, could it become the prosecutor's money except by the operation of the principle of *Taylor* v. *Plumer* ? It is submitted that these two cases were in fact applications of that principle. For a similar recent case, see *R.* v. *Hastings* [1957] Crim.L.R. 612.

(*To be continued*)

How to run a Lottery

By P. K. L. Danks

(*Continued from p.* 600)

Offences in connection with Lotteries

A. *Unlawful lotteries.*

Section 22 of the 1934 Act relates to offences committed in connection with lotteries, not otherwise exempt from prohibition, promoted or proposed to be promoted either in Great Britain or elsewhere.[81]

For the purposes of the 1934 Act, where a person convicted of an offence under the Act is a body corporate, every person who at the date of the commission of the offence was a director or officer of the body corporate is also deemed to be guilty of that offence unless he proves that the offence was committed without his knowledge.[82]

It was held in *Ransom* v. *Burgess*[83] that if a man sends a scheme to be printed and the printer sends the printed scheme to a third party, he thereby makes a proposal to that third party.

Every person is guilty of an offence who:—

(1) Prints any ticket for use in the lottery.[84]

N.B.—(i) Printing is to be construed as including references to writing and other modes of representing or reproducing words in visible form[85];

(ii) Ticket includes, in relation to any lottery or proposed lottery, any document evidencing the claim of a person to participate in the chances of the lottery[86];

(iii) In *McKay* v. *Gillies*[87] the appellants were printers who printed, kept in stock and sold tickets which were designed for use in lotteries. They sold a number of tickets to a man who promoted an unlawful lottery. Appellants contended that the tickets could have been used in a lawful lottery and they did not know they were going to be used in an unlawful lottery. As one said, "If I sell a pack of playing cards and they are used for gambling that does not make me liable." Held that there was no evidence that tickets were either printed for use, or possessed by the appellants for sale, or distributed, in connection with "the" (not "a") lottery which was held to be unlawful.

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[81] s. 22 (1) of the 1934 Act.
[82] s. 29 (1) of the 1934 Act.
[83] (1927) 91 J.P. 133.
[84] s. 29 (1) (*a*) of the 1934 Act.
[85] s. 28 (2) (*a*) of the 1934 Act.
[86] s. 28 (1) of the 1934 Act.
[87] [1956] 1 W.L.R. 1402.

or (2) Sells or distributes, or offers or advertises for sale or distribution, or has in his possession for the purpose of sale or distribution any tickets or chances in the lottery.[88]

N.B.—(i) Documents or other matters are deemed to be distributed if they are distributed to persons or places whether within or outside Great Britain, and the expression "distribution" should be construed accordingly.[89]

(ii) See *McKay* v. *Gillies*.[87]

(iii) The purchaser of a ticket sold in Great Britain is liable to be dealt with as an aider and abettor (in England and Wales) under section 35, Magistrates' Courts Act, 1952.

(iv) In *Corfield* v. *Dolby* [90] the appellant received from the purchaser 48 tickets in a lottery on behalf of a syndicate which included the appellant and the purchaser. He collected money weekly from the members of the syndicate and paid it to the purchaser. Each member held a part of the 48 tickets and no individual was entitled to any ticket or tickets. Any prizes would have been shared equally between the members of the syndicate. The appellant was convicted of having tickets in his possession for sale or distribution. Held that there was no evidence to substantiate this. No such sale of tickets to members was contemplated, the intention being that the appellant should hold the tickets as custodian on behalf of all members.

or (3) Prints, publishes or distributes, or has in his possession for the purpose of publication or distribution

(a) any advertisement of the lottery [91];

or (b) any list (whether complete or not) of prize winners or winning tickets in the lottery [91];

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[88] s. 22 (1) (*b*) of the 1934 Act.

[89] s. 28 (2) (*b*) of the 1934 Act.

[90] (1936) 100 J.P. 75.

[91] s. 22 (1) (*c*) of the 1934 Act.

or (c) any such matter descriptive of the drawing or intended drawing of the lottery, or otherwise relating to the lottery as is calculated to act as an inducement to persons to participate in that lottery or in other lotteries[91];

N.B.—(i) Printing—see (1) (i) above;

(ii) In *Dew* v. *Director of Public Prosecutions*[92] it was held that when the draft circular (concerning a lottery) was received by the printer for reproduction, some printer must have read at least one circular. Publishing something means nothing more than making it known to someone other than the person who originates it;

(iii) Proceedings under sub-paragraph (c) in respect of any matter published in a newspaper must not be instituted except by, or by direction of, the Director of Public Prosecutions.[93] (This does not apply in Scotland.[94])

or (4) Brings, or invites any person to send, into Great Britain for the purpose of sale or distribution any ticket in, or advertisement of, the lottery.[95]

N.B.—No offence is committed if the ticket is for the personal use of the accused, there then being no sale or distribution.

or (5) Sends or attempts to send out of Great Britain any money or valuable thing received in respect of the sale or distribution, or any document recording the sale or distribution, or the identity of the holder, of any ticket or chance in the lottery.[96]

N.B.—(i) Money includes a cheque, banknote, postal order or money order.[97]

(ii) This section is designed to prevent persons in Great Britain engaging in selling or distributing tickets in any lottery promoted abroad (*e.g.*, the Irish Sweep Stake).

(iii) " Any document recording . . . the identity of the holder of any ticket or chance in the lottery " will include the case of persons who attempt to send out of Great Britain counterfoils recording the purchase of tickets for themselves. During the passage of the Bill through the House of Commons the Home Secretary assured the House of Commons that it was not intended that criminal proceedings should be instituted against a person who sends money out of Great Britain for a ticket purchased merely for his own use;

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[92] (1920) 85 J.P. 81.

[93] s. 21 (3) of the 1934 Act.

[94] s. 30 (7) of the 1934 Act.

[95] s. 22 (1) (*d*) of the 1934 Act.

[96] s. 22 (1) (*e*) of the 1934 Act.

[97] s. 28 (1) of the 1934 Act.

(iv) The section is aimed at an agent of a foreign lottery in Great Britain who receives books of tickets for sale and who sends the proceeds of sales and counterfoils out of the country.

or (6) Uses any premises, or causes or knowingly permits any premises to be used, for purposes connected with the promotion or conduct of the lottery.[98]

or (7) Causes, procures or attempts to procure, any person to do any of the above-mentioned acts (*i.e.*, (1)–(6)).[99]

B. *Lawful Lotteries.*

1. *Small lotteries incidental to certain entertainments.* If any of the conditions are broken every person concerned in the promotion or conduct of the lottery is guilty of an offence, unless he proves that the offence was committed without his knowledge.

2. *Small gaming parties.* A house, room or place is only not to be deemed a common gaming house, or opened, kept or used for playing at any unlawful game or for the purpose of unlawful gaming if it is used for a small gaming party held in accordance with the 1956 Act, and any game played in such circumstances is not deemed to be an unlawful lottery.

The 1956 Act does not affect section 141 of the Licensing Act, 1953, which penalises the holder of a justices' licence who allows gaming or unlawful games in his premises, or section 53 of the Licensing (Scotland) Act, 1903, which penalises the holder of a certificate within the meaning of that Act in respect of any breach of the terms and conditions of the certificate including terms and conditions as to permitting unlawful games, or section 32 of the Refreshment Houses Act, 1860, which penalises the licensee of a refreshment house who allows unlawful games or gaming therein.

3. *Private lotteries.* If any of the conditions concerning proceeds expenses, prizes, tickets (except (6) (c)) or advertisements are broken, section 24 (3) makes it clear that such a breach does not make the lottery an unlawful one, but each of the promoters,

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[98] s. 22 (1) (*f*) of the 1934 Act.

[99] s. 22 (1) (*g*) of the 1934 Act.

and where the person by whom thecondition is broken is not one of the promoters, that person also is guilty of an offence.[7] The offence of breach of condition should be charged under section 24.

4. *Art union lotteries.* So long as persons connected with art unions comply with the provisions of the Act of 1846 as amended by the 1934 Act, they are protected from penalties under the 1934 Act.

5. *Small lotteries.* (i) If any of the conditions concerning the promoter, proceeds, expenses, prizes, tickets or advertisements are broken, the promoter of the lottery and any other person who is party to the contravention is guilty of an offence.[8]

If any person:—

(ii) (a) fails to send a return in accordance with the Act
or (b) knowingly gives in a return any information which is false or misleading
or (c) certifies any return to be sent knowing it to contain any such information

he is guilty of an offence.[9]

Defences in connection with Lotteries

A. *Unlawful Lotteries.* There are no special statutory defences provided.

B. *Lawful Lotteries.*

(1) *General defence.* In any proceedings instituted under the heading "offences 1–7" it is a defence to prove that the lottery to which the proceedings relate was such a lottery as is declared to be lawful by the 1934 or 1956 Act, and at the date of the alleged offence the accused believed, and had reasonable grounds for believing, that none of the conditions required by that section to be observed in connection with the promotion and conduct of the lottery had been broken.[10]

It should be noted that once a lottery is declared lawful it does not become unlawful by reason of the breach of one of the conditions under which the lottery must by statute be promoted.[11]

(2) *Specific defences.*

(i) *Small lotteries incidental to certain entertainments.* It is a defence to prove that the offence was committed without the knowledge of the accused.[12]

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[7] s. 24 (3) of the 1934 Act.
[8] s. 1 (3) of the 1956 Act.
[9] s. 3 (3) of the 1956 Act.
[10] s. 22 (2) of the 1934 Act.
[11] *Stacey* v. *Wilkins* [1946] K.B. 271.

(ii) *Private lotteries.* It is a defence for a person charged only by reason of his being a promoter of the lottery to prove that the offence was committed without his knowledge.[13]

(iii) *Small lotteries.* If a person is charged with any offence only by reason of his being the promoter it is a defence to prove that the contravention took place without his knowledge.[14]

It is also a defence for any person charged with an offence in respect of an appropriation or payment regarding the expenses (see Expenses 1 and 2) or the prizes (see Prizes 2 and 3) to prove that

(a) the proceeds of the lottery fell short of the sum reasonably estimated; and

(b) the appropriation or payment was made in respect of expenses actually incurred or in order to fulfil an unconditional undertaking as to prizes given in connection with the sale of the relevant tickets or chances; and

(c) the total amount appropriated or paid in respect of expenses and prizes did not exceed the amounts which could lawfully have been appropriated out of the proceeds of the lottery under expenses (1) and prizes (2) if the proceeds had amounted to the sum reasonably estimated.[15]

Penalties

1. Anyone guilty of an offence concerning an unlawful lottery or the breach of a condition in a lawful lottery is liable:—

(a) on summary conviction [16]
  (i) first offence—a fine not exceeding £100;
  (ii) second or subsequent offence—imprisonment not exceeding three months and/or a fine not exceeding £200;

(b) on conviction on indictment [17]
  (i) first offence—a fine not exceeding £500;
  (ii) second or subsequent offence—imprisonment not exceeding one year and/or a fine not exceeding £750.

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[12] s. 23 (1) of the 1934 Act.
[13] s. 24 (3) of the 1934 Act.
[14] s. 1 (3) (*a*) of the 1956 Act.
[15] s. 1 (3) (*b*) of the 1956 Act.
[16] s. 30 (1) (*a*) of the 1934 Act.
[17] s. 30 (1) (*b*) of the 1934 Act.

2. Anyone guilty of an offence concerning the rendering of a return (see p. 599) is liable on summary conviction to a fine not exceeding £20.[18]

Forfeitures

The court before which a person is proved to have committed an offence (except one concerning the rendition of a return under the 1956 Act) in relation to a lottery or proposed lottery must order to be forfeited any coins and bank notes produced to the court which are shown to the satisfaction of the court to represent the price of tickets, or prize money or prizes in the lottery (money includes cheques, banknotes, postal and money orders [19]) and must order to be destroyed all documents (*i.e.*, postal and money orders and cheques but not bank notes [20]) produced to the court which are shown to the satisfaction of the court to relate to the promotion or conduct of the lottery.[21]

A "fine" within the Magistrates' Courts Act, 1952, includes any pecuniary forfeiture.[22]

Search Warrants

Any Justice of the Peace (and in Scotland also a Sheriff),[23] if satisfied by information on oath that any premises are being used for the purposes of the commission of an offence under Part II of the 1934 Act in connection with a lottery or proposed lottery, may grant a warrant under his hand authorising any constable, at any time or times within one month from the date thereof, to enter, if necessary by force, the said premises and every part thereof, and to search for and seize and remove any documents, money or valuable thing found therein which he has reasonable ground to suppose are on those premises for any purpose which constitutes an infringement of any provision of Part II of the 1934 Act.[24]

N.B.—(i) Part II of the 1934 Act means sections 21–28 of that Act and also sections 1 and 4 of the 1956 Act which are deemed to follow section 22 of the 1934 Act [25];

(ii) Money includes cheque, bank note, postal order or money order [26];

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[18] s. 3 (3) of the 1956 Act.
[19] s. 28 (1) of the 1934 Act.
[20] *Strang* v. *Adair*, 1936 S.C.(J.) 56.
[21] s. 30 (3) of the 1934 Act.
[22] s. 126 (1), Magistrates' Courts Act, 1952.
[23] s. 30 (8) of the 1934 Act.
[24] s. 27 of the 1934 Act.
[25] s. 5 (1) of the 1956 Act.
[26] s. 28 (1) of the 1934 Act.

(iii) the warrant can be executed on Sunday;
(iv) there is no power of arrest.

Forms

Suggested form of application for registration under section 2 of the 1956 Act

To ....

I, [*name*] .... of [*address*] .... hereby apply on behalf of the [*name of Society*] .... whose [head] office is situated at [*address of Society*] .... for registration of the Society in accordance with section 2 of the Small Lotteries and Gaming Act, 1956. The purposes for which the Society is established and conducted are [*set out purposes*] ....

Enclosed in the registration fee of £1.

Date of application ....

Signed ....
Position held in the Society ....

Suggested form of return in accordance with section 3 of the 1956 Act

To ....

I, [*name*] .... of [*address*] .... being a member of [*name of Society*] .... authorised in writing by the governing body of such Society to promote a lottery in which tickets or chances were on sale between [*date*] .... and [*date*] .... hereby send the following information:—

1. The whole proceeds of the lottery amounted to £
2. The sums appropriated out of these proceeds were:—
   (a) on account of expenses ... ... £
   (b) on account of prizes ... ... £
   (c) on account of pool betting duty (if any) ... £
3. The amount of £ was applied to the following purposes of the Society [*set out purpose*(*s*) *and amount*(*s*)] ....

Date ....   Signed [*by promoter*] ....

We, the undersigned, being of full age and appointed in writing by the governing body of the above Society hereby certify this return to be true and correct:—

1. [*Signature of a member of the Society*].......................
2. [*Signature of another member of the Society*] ....

Mr. Sutterthwick's Court

By A. E. Jones, *Magistrates' Clerk*

A Custody Case

It was the last case in the afternoon list. Only a few people were left in the court room, and none at all in the public seats; for this was a "domestic proceeding." An air almost of peace and restfulness was conveyed by the nearly deserted scene, but Mr. Sutterthwick, the magistrate, and Frell, the clerk, were not deceived. Mr. Chaye of counsel and Mr. Tarkaway, one of the busiest of the local solicitors, were in the seats reserved for their respective professions. Their presence foreshadowed a hard-fought forensic battle. Mr. Sutterthwick looked at his register; the only adjudication which remained to be filled in was against the Guardianship of Infants Act case in which Samuel Bilham was shown as the complainant and Marjorie Bilham as the defendant.

The warrant officer called the parties into the court room and Mr. Chaye announced that he appeared for the husband while his friend, Mr. Tarkaway, appeared for the wife and was, he understood, contesting his client's application to be given the legal custody of the child of the marriage. Mr. Chaye, with his rosy face and white hair, looked more like a family doctor than the conventional idea of a lawyer, and he had, in fact, a family doctor sort of practice and a family doctor sort of way with him. It was a way, however, which he had comparatively few occasions to practise in the magistrates' courts because not many of the litigants who came there could afford the fees which the skill and art of his persuasive reasonableness commanded. Samuel Bilham, however, kept a grocer's shop and he was fighting for his child.

"My client," began Mr. Chaye, "has brought this summons against his wife with the greatest reluctance. His was a love match in the truest sense, and, in spite of the fact that his wife has now left him—without any real justification, as he feels—he is still deeply in love with her. Only one outcome of this case could give him perfect satisfaction, and that would be the return of his wife to live with him. Even at this moment, through me, he begs her to forget the past and any unhappy differences there may have been—if not for his sake, at least for the sake of their child who, like every other child, requires the care and influence of both a father and a mother for a complete and happy development. But if Mrs. Bilham will not accept this offer of his, then he must pursue these legal proceedings to assert his paternal claim to have custody of the child. I know that in this case you, sir, will not feel called on to consider the merits of the parties as husband and wife, but will have regard, as the statute directs,[1] to the welfare of the child. I am confident that I could satisfy you that the wife has deserted the husband without having, in law, good cause. I am aware, however, that that matter is largely irrelevant to the issue you have to decide. I must nevertheless refer to the main source of trouble between the parties because it has an intimate bearing on the interests and future of the child. The basic cause of the friction which has arisen is, unfortunately, a religious difference between the parties. My client is, and always has been, a Roman Catholic. Mrs. Bilham, before her marriage, belonged to the Church of England. But, probably as a result of her fiancé's fervour, she agreed after her engagement to change her religion, and she began to receive instruction from a priest in the Roman Catholic faith. The marriage took place in a Roman Catholic church, before her course of instruction was completed, and the arrangement was that she would continue it after the honeymoon. Very soon, however, my client noticed a falling off of her interest in his church, and eventually she told him that she was fed up with it—as she put it. In the end she refused to come to church any more with him. The husband is a devout practising Catholic, and he was very upset that she should take up this attitude after having promised to adopt the same faith as himself. The wife resented his protests and I am afraid that a considerable amount of bitterness came into their general relationship as a result of the matter. Finally, just about a month before the birth of the child and less than ten months after their marriage, Mrs. Bilham left her husband and went back to live with her mother. She is at this moment still living with her mother. My client went to see his wife in hospital after the child was born and endeavoured to persuade her to return to him with the baby. He undertook to make no further attempt to hold her to her promise to become a Roman Catholic and he made it clear that she would be quite free in future to attend the Church of England without objection on his part. He did, however, make one stipulation—that the child should be brought up in the Roman Catholic faith. But Mrs. Bilham refused to consider a reconciliation on any terms and announced her determination that the child's religion was to be that of the Church of England and not the Roman Catholic Church. She has, in fact, since then, had the child baptised into the Church of England—a proceeding which has caused my client much grief and anxiety. It may seem to some of us—perhaps to you, sir—that it is absurd to be so perturbed over this action of the wife's. After all, the rite is a Christian one whichever church it is celebrated in, and the child is a helpless agent and cannot, when he reaches years of discretion, be bound by what has been done. But the matter has a special and peculiar importance in this particular case. Mr. Bilham is a member of a family all of whom are devout Catholics. A certain childless aunt of his, who is quite comfortably off, had expressed an intention to leave her money, or some of it, to this child of his if it turned out to be a boy—as it has. But she will, in all probability, refuse to entertain the idea of making a will in favour of a relation who is not of the Roman Catholic faith. Thus, if the child is to remain with the mother, its whole future financial status may be most deleteriously affected by her resolve to bring it up in the Church of England. That is one of the reasons why I venture to assert that the welfare of this child, which is the paramount consideration in these proceedings, demands that custody should be vested in Mr. Bilham. His mother, who is a lady of fifty-two in good health, would look after the child for him in its tender years and, with her own experience in raising a family, would be able to give the baby all the care and attention that it could receive from Mrs. Bilham. In addition, there is no question that my client's financial position would enable him to give his son advantages, educational and otherwise, which would be beyond the wife's means to provide. Her mother is a widow with only a small pension to live on; she lives in a very modest flat with no garden. Mrs. Bilham will undoubtedly have to take employment as soon as she is well enough. She was, before her marriage, a shop assistant, and if she returns to that occupation—which is the only one she has qualifications for—it is pretty certain that she will not have much money to spare for extras for the child. My client is still living in the matrimonial home which is a three-bedroomed house with a garden; and his business, though not a large one, yields quite a substantial income. For all these reasons it is my submission that it is in the child's best interests to be with his father, and I ask you, sir, to make an order in my client's favour. I will now call Mr. Bilham to give evidence."

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[1] Guardianship of Infants Act, 1925, s. 1.

"But," said Mr. Sutterthwick, "are you really asking me to take a baby from its mother?"

Mr. Tarkaway rose to score a point. "I think you should know, sir," he said, "that the child is being fed at the breast."

" You will remember what I said at the outset, sir," countered Mr. Chaye, " my client is willing and anxious that his wife and child should live with him in the normal way that a family should—in their own home. That is why he has kept on the house where they were living. It is not his wish that there should be a separation. These proceedings have been forced on him by his wife's conduct."

Mr. Sutterthwick looked enquiringly at Mrs. Bilham's advocate. Mr. Tarkaway was too old a campaigner in magistrates' courts to be daunted even by counsel of Mr. Chaye's standing and reputation. He addressed the magistrate now with every appearance of confidence in the justice of his client's case.

" As my learned friend said, when he proceeded to give you his version of the matrimonial differences between the parties, these matters are really irrelevant to the issue you have to decide in this case, sir. But it must not be taken for one moment that we admit what has been said about the causes of the separation. My client's story is a very different one. You will note, sir, that this repentance of the husband's comes only after the birth of a son. That is most significant. The wife is convinced that his alleged desire for a reconciliation is inspired only by a determination to have the child, and not by any real feelings of affection for herself. After the way he treated her during her pregnancy she has no faith in the protestations he makes now through his learned counsel. She does not believe they can be genuine in view of what has happened in the past. She left him only because the constant quarrels he forced on her over these unhappy religious differences were undermining her health, and she feared the effect on her child. She has told me quite plainly that his behaviour has completely killed her love for him and she would not, in any circumstances, entertain the idea of returning to him."

" Does your client, Mr. Chaye, still wish to proceed with this case in view of that very plain statement? " asked the magistrate.

" Yes, sir, he must—for the sake of the child, as I've explained. But I appreciate your difficulty, sir, at the present moment, having regard to the tender age of the child. I think my client must face the fact that you will not order a baby to be removed from its mother while she is still feeding it. There is, however, one matter which, for reasons I've already given, he does feel most strongly about, and in respect of which you could quite properly, in my submission, grant him some relief. Would you, sir, make an order giving him custody of the child just for a few hours so that he can arrange for it to be baptised according to the rites of the Roman Catholic Church? "

"I doubt whether I've power to make an order in such a form," said Mr. Sutterthwick. "And in any case I don't think I ought to lend the processes of the court for the furtherance of some sectarian religious purpose—whether it's Roman Catholic or Church of England, or any other denomination."

"Well, sir, it is only the counterpart of what the wife has done."

"Yes, I know. But she didn't have the help of the court in that, and she wouldn't have got it if she had needed it—not from me, at any rate."

Mr. Tarkaway got up and said: "If you are not prepared to make an order of custody in favour of the husband, sir, I would ask you, after hearing the evidence, to make one in favour of the wife. You have power to do so, even though it is the husband's summons, so long as you are satisfied it is for the welfare of the child. I think the present position leaves no doubt as to that."

"My friend is an opportunist, " said Mr. Chaye, "and a very optimistic one, too, if he expects to persuade you, sir, to make a custody order with permanent effect on the purely temporary circumstance that the child is breast fed. That would be very unfair to my client, in my respectful submission."

"These proceedings have been very unfair to *my* client," retorted Mr. Tarkaway. "In her present state of health—so soon after the birth of her child—they have had a most upsetting effect on her."

"The fault, if I may say so, . . ." began Mr. Chaye, but Mr. Sutterthwick intervened with: "All this isn't getting us very far, I'm afraid. I don't intend to make any order at all in this case, if I can help it. In fact, I consider this is emphatically an application which should be decided by the High Court and I should be justified in refusing to make an order on that ground."

"I hope you won't take that course, sir," said Mr. Tarkaway. "My client's financial resources are very limited. I'm quite certain she could not afford to be legally represented in a Chancery action."

"My client also has no desire to embark on costly litigation," said Mr. Chaye. "He would much prefer you to accept jurisdiction in the matter, sir."

Mr. Sutterthwick felt it was very unfair of fate to place a case like this at the end of a heavy day's work. "How would it be if I adjourned the summons for six months or so?" he said. "The child will no longer be at the breast then, at any rate."

The clerk now intervened in what had begun to take on the character of a conference, rather than a judicial hearing. "The High Court has held that adjourning an application for custody for six months is tantamount to refusing to make an order,"[2] he pointed out.

"My client would not take any point on that," said Mr. Chaye.

"There would be no point in my client taking any point on it," said Mr. Tarkaway. "If you dismissed the husband's application today there would be nothing to stop him making a fresh one in six months' time."

"An adjournment of that period would give the wife ample time and opportunity to reflect on her position," said the magistrate. "I think she should consider much more seriously the reconciliation overtures of her husband."

Frell got up and whispered urgently: "The High Court said in the case I referred to, sir, that an adjournment mustn't be ordered to put pressure on the wife to go back to her husband."

"I haven't said too much—yet," Mr. Sutterthwick whispered back reassuringly. Aloud he said: "I think three months' adjournment will be sufficient in this case. I shall ask the probation officer to see the parties and use his best endeavours to bring them together again."

This brought Thorburton into the conference. "I did see both of them, soon after the separation, sir," he said. "The husband came to me first, and I got in touch with the wife as a result. I'd better confine myself to saying that I found there was nothing I could usefully do at that time. Perhaps if you, sir, were to address a few words to the parties now, it might help me in making a fresh attempt."

Mr. Sutterthwick sighed inwardly and cleared his throat. "I do sincerely trust," he began, "that this adjournment will bring a full realisation to the parties of how much a separation at this early stage of their marriage will mean, not only to their own lives but also to their child's future. There's no getting away from the fact that it is the child of both of you and needs you both. I haven't heard the evidence and, course, I'm not deciding anything, but Mrs. Bilham should understand that if I do eventually have to decide this case—I hope it won't be necessary—but if I do, I shall be bound to consider, not the rights and wrongs of your domestic disputes but which parent offers the best prospects for the child as its future guardian. Mr. Bilham may have behaved badly to his wife in the past—I don't know, as I haven't heard any evidence—but if he has, he should spare no effort to show his contrition and his determination to make his wife happy if she will have him back. Mrs. Bilham should not be too hasty or obstinate in rejecting any overtures he makes; her religion does not enjoin her to be uncharitable or unforgiving about the past. I hope you'll both see the probation officer and profit by his advice. He's very experienced in these matters."

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[2] *Ex p. Jarrett* (1946) 62 T.L.R. 230.

"Thank you, sir," said Mr. Chaye. "Would it be possible for you to give some direction which would enable my client to have the child baptised in the Roman Catholic faith in the meantime."

"I don't think I have any power to," said Mr. Sutterthwick. "It would be a nice gesture if the wife agreed to satisfy her husband on that point. I will say no more than that."

"As you please, sir," said Mr. Chaye.

"There's no other business for your worship's attention," said Sergeant Quing.

The tenseness which the magistrate and clerk had felt in the stuffy atmosphere all through the day seemed to vanish in an instant. A spirit of relaxation seemed to possess the court room. Now that the sound of human voices had ceased the ticking of the big clock on the wall asserted itself. The time was just two minutes to five.

The Wolfenden Report

The following is a summary of the Report of the Committee on Homosexual Offences and Prostitution.

(*a*) *Homosexual Offences*

The Committee recommend:

"(i) That homosexual behaviour between consenting adults in private be no longer a criminal offence (paragraph 62).

"(ii) That questions relating to 'consent' and 'in private' be decided by the same criteria as apply in the case of heterosexual acts between adults (paragraphs 63, 64).

"(iii) That the age of 'adulthood' for the purposes of the proposed change in the law be fixed at twenty-one (paragraph 71).

"* (iv) That no proceedings be taken in respect of any homosexual act (other than an indecent assault) committed in private by a person under twenty-one, except by the Director of Public Prosecutions or with the sanction of the Attorney-General (paragraph 72).

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* These Recommendations have application only in relation to England and Wales.

" (v) That the law relating to living on the earnings of prostitution be applied to the earnings of male, as well as female, prostitution (paragraph 76).

" (vi) That the law be amended, if necessary, so as to make it explicit that the term ' brothel ' includes premises used for homosexual practices (paragraph 76).

" (vii) That there be introduced revised maximum penalties in respect of buggery, gross indecency and indecent assaults (paragraphs 90, 91).

" * (viii) That buggery be re-classified as a misdemeanour (paragraph 94).

" (ix) That except for some grave reason, proceedings be not instituted in respect of homosexual offences incidentally revealed in the course of investigating allegations of blackmail (paragraph 112).

" * (x) That section 29 (3) of the Larceny Act, 1916, be extended so as to apply to all homosexual offences (paragraph 113).

" * (xi) That the offence of gross indecency between male persons be made triable summarily with the consent of the accused (paragraph 114).

" * (xii) That male persons charged with importuning for immoral purposes be entitled to claim trial by jury (paragraph 123).

" (xiii) That except for indecent assaults, the prosecution of any homosexual offence more than twelve months old be barred by statute (paragraph 135).

" (xiv) That subject to any necessary special safeguards, managers and headmasters of approved schools be allowed the same measure of discretion in dealing with homosexual behaviour between inmates as that enjoyed by those responsible for the management of any other educational establishment (paragraph 147).

" (xv) That the organisation, establishment and conditions of service of the prison medical service be reviewed (paragraph 180).

" (xvi) That a court by which a person under twenty-one is found guilty of a homosexual offence be required to obtain and consider a psychiatric report before passing sentence (paragraph 187).

" (xvii) That prisoners desirous of having oestrogen treatment be permitted to do so if the prison medical officer considers that this would be beneficial (paragraph 211).

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* These Recommendations have application only in relation to England and Wales.

"(xviii) That research be instituted into the aetiology of homosexuality and the effects of various forms of treatment (paragraph 216)."

(b) Prostitution

The Committee recommend:

"* (xix) That the law relating to street offences be reformulated so as to eliminate the requirement to establish annoyance (paragraph 256).

"(xx) That the law be made of general application (paragraph 266).

"(xxi) That consideration be given to the possibility of introducing more widely the more formal system of cautioning prostitutes which is in force in Edinburgh and Glasgow (paragraph 270).

"(xxii) That consideration be given to the practicability of extending the practice of referring to a moral welfare worker particulars of a prostitute cautioned for the first time (paragraph 270).

"(xxiii) That the maximum penalties for street offences be increased, and that a system of progressively higher penalties for repeated offences be introduced (paragraph 275).

"(xxiv) That courts be given explicit power to remand, in custody if need be, for not more than three weeks, a prostitute convicted for the first or second time of a street offence, in order that a social or medical report may be obtained (paragraph 280).

"(xxv) That researches be instituted into the aetiology of prostitution (paragraph 297).

"* (xxvi) That magistrates' courts be empowered, on convicting a tenant or occupier of

(i) keeping or managing, or acting or assisting in the management of, a brothel; or
(ii) knowingly permitting the premises to be used as a brothel; or
(iii) knowingly permitting premises to be used for the purposes of habitual prostitution,

to make an order determining the tenancy or requiring the tenant to assign the tenancy to a person approved by the landlord (paragraph 326).

"* (xxvii) That the landlord have the right to be heard in regard to the making of such an order (paragraph 327).

"* (xxviii) That the courts be empowered to require a tenant or occupier charged with any of the offences mentioned in Recommendation (xxvi) to disclose the name and address of the person to whom he pays his rent; and that there be similar power to require each lessor of the premises, in turn, to disclose the name and address of his superior lessor (paragraph 328).

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* These Recommendations have application only in relation to England and Wales.

" (xxix) That a landlord letting premises at an exorbitant rent in the knowledge that they are to be used for the purposes of prostitution be deemed, in law, to be " living on the earnings of prostitution "; and that the same apply to any agent knowingly taking part in the transaction (paragraph 331).

" * (xxx) That prosecutions in respect of premises used for immoral purposes be undertaken, as a general rule, by the police (paragraph 335)."

Reservations

The report is signed by all thirteen members who served on the committee throughout the inquiry, but there are five separate reservations by members or groups of members.

Mr. James Adair, formerly Procurator-General at Glasgow, dissociates himself from the recommendation that homosexual acts committed in private by consenting male adults should be taken out of the realm of criminal law. He argues that if the recommendation is adopted the force of the law will be weakened, and that the removal of the present prohibition would be regarded by homosexuals as " condoning or licensing licentiousness."

There are a number of other reservations in regard to the recommendations on law relating to homosexual offences, dealing principally with the continuance of the distinction between buggery and other homosexual offences, importuning and the question of maximum punishment.

There is also a reservation by the three women members of the Committee, Mrs. Cohen, Mrs. Lovibond and Lady Stopford, recommending that the maximum penalty for living on the earnings of prostitution be raised to five years.

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* These Recommendations have application only in relation to England and Wales.

Report of the Select Committee on Naval Discipline *

The function of this Committee was to lay before Parliament a new Naval Discipline Bill, bringing up to date the present Naval Discipline Act which, although drafted in 1866, still derives much both in form and substance from the original Act of 1661. Not only were the Committee required to modernise the existing Act but they were also confronted with the need to align it as far as possible with the new Army and Air Force Acts. The need for uniformity both in offences and punishments is one which has grown and will continue to grow with the advance of inter-Service postings, operations and administration. The Committee's Naval representation was catholic including as it did—a retired Admiral, two other retired Naval officers, a war-time R.N.V.R. officer, and a member who had succeeded in serving the Admiralty in the diverse roles of stoker and Parliamentary Secretary. Their report, 600-odd pages long, is ample testimony to their interest and industry.

The Committee freely recognised the need for Commanding Officers of H.M. ships to retain their present wide powers of summary punishment with the maximum of three months' imprisonment although this is in excess of the powers granted to Commanding Officers in the other Services. The Navy must always remain a highly mobile force which cannot be specially operated to allow courts-martial to be held for comparatively trivial offences, and consequently Commanding Officers must retain their high powers of summary punishment. A corollary of these wide powers of summary punishment is that the number of trials by courts-martial in the Royal Navy remain at a low level. In 1956, for example, the total number of courts-martial held was only one hundred.

The Committee recognised that since the safety of a ship and her crew must depend on the same high standard of discipline at all times, there cannot be any considerable difference between the standards of Naval discipline in peace and war. This is at variance with the practice in other Services, where penalties can be lighter in peacetime. The case for a two-tier system of punishment differentiating between offences committed afloat and ashore, was rejected partly because of the difficulties of administration, but principally because it would appear to add to the existing

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* H.C. Papers, Session 1955–1956, No. 421. And see summary of the Naval Discipline Act, 1957, below p. 692.

hardships of life afloat in an arm whose central feature must always be service afloat.

The Committee considered the increasing degree to which the different Services interact and appreciate that it might well happen that members of all three Services might become involved in a joint offence—in a mutiny, for example. For this reason they have paid great attention to following the wording of the Army Act whenever possible. In sweeping away the cobwebs they have abolished a number of references which conjure up visions of the Napoleonic wars. The new Bill contains no reference to false musters, prize money or corporal punishment, and the number of offences which now attract the death penalty has been reduced. In their place come references to aeroplanes, non-Executive officers permitted to sit as members of courts, fines for officers (up to thirty days' pay to replace the old punishment of dismissal from ship with its consequent half pay) ; but not strangely enough to Wrens, whom it was not considered necessary to bring within the orbit of the Naval Discipline Act.

Provision is made for civilians attached to the Navy, and families of Naval personnel, to be made subject to Service discipline when abroad. This provision stems from the NATO Status of Forces Agreement and other similar conventions which provide for Service Tribunals of Service forces to try offences committed by members of visiting forces and their camp followers provided the offences do not involve personal property of a member of the foreign country. Civilians made subject to the Naval Discipline Act in this way are of course only liable to the normal civil punishments and not to the full rigour of Naval discipline.

The many alterations in the extent, range and application of the new Bill include the power of a court to make restitution of stolen property up to a value of £100, substitute the requirement of a unanimous vote for the death penalty instead of the four-fifths majority as at present, and provide for the Admiralty to have powers, already possessed by the Army Council, of dispensing with the trial of deserters who admit desertion and of imposing forfeitures on them as a punishment. A valuable addition makes attempts to commit offences against the Naval Discipline Act into offences in their own right.

The jurisdiction of the Naval Discipline Act has been extended to conform with the Army Act so that all civil offences, except treason, murder, manslaughter, treason felony, and rape, committed on shore in the United Kingdom can now be dealt with under the Naval Discipline Act. One result which is expected to stem from this extension is a very large reduction in the number and scope of cases which attract Naval "consequential penalties." All civil convictions against Naval ratings have been liable to attract these consequential penalties of dismissal, disrating, deprivation of good conduct medals and badges, stoppage of leave, etc., depending on the degree of discredit on the uniform which a Commanding Officer considers has resulted; not only has this practice been considered undesirable because it too often appears that a man may be punished twice for the same offence, but also because civil courts appear to give lesser punishments to Naval delinquents in the knowledge that they could rely on Commanding Officers to add some further penalty to their punishment. The extension of the Naval Discipline Act to allow civil offences to be dealt with by the Navy should considerably reduce the number of offences which come before the civil courts and thus in turn do much to correct the present anomaly; the Admiralty it is understood will greatly reduce the range and application of these penalties.

Signs of the progress, improvements and advances made in our Naval service over the last century are all clearly reflected in the Committee's draft Bill. Many will regret the necessity of the change in the time-honoured preamble which read "whereas it is expedient to amend the law relating to the government of Her Majesty's Navy, whereon, under the good Providence of God, the wealth, safety and strength of the kingdom *chiefly* depend," but few will deny the reasons which have impelled the Committee to recommend that "so much" should be substituted for "chiefly."

Practice and Procedure

Magistrates' Courts

HOME OFFICE CIRCULAR NO. 151/1957

Magistrates' Courts Act, 1957,[1] *and Magistrates' Courts Rules, 1957*[2]

"I am directed by the Secretary of State to refer to the Magistrates' Courts Act, 1957, and to enclose a copy of the Magistrates' Courts Rules, 1957.

"2. The Act, as supplemented by the Rules, introduces from 6th September, 1957, a procedure which allows defendants, in certain circumstances, to plead guilty in magistrates' courts without appearing in court. It also provides for the easier proof of previous convictions in the defendant's absence. In both these respects the Act gives general effect to the recommendations of the Departmental Committee on the Summary Trial of Minor Offences (Cmd. 9524).

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[1] See [1957] Crim.L.R. 547.

[2] See p. 696, below.

The new procedure for accepting a plea of guilty from an absent defendant

" 3. Section 1 (1) provides that the new procedure for accepting a plea of guilty from an absent defendant shall apply where a summons has been issued requiring a person to appear before a magistrates' court, other than a juvenile court, to answer to an information for a summary offence, not being an offence which is also triable on indictment or an offence for which the accused is liable to be sentenced to be imprisoned for a term exceeding three months, and the clerk of the court is notified by or on behalf of the prosecutor that the following documents have been served upon the accused with the summons:—

(i) a notice containing such statement of the effect of the section as may be prescribed (see Rule 1 (1) and Form 1 of the forms scheduled to the Rules);

(ii) a concise statement in the prescribed form of such facts relating to the charge as will be placed before the court by or on behalf of the prosecutor if the accused pleads guilty without appearing before the court (see Rule 1 (2) and Form 2 of the forms scheduled to the Rules).

Chief Constables have been advised that when the accused is charged with more than one offence a separate statement of facts should whenever practicable be served for each charge. Proof of service of the notice and of the statement of facts may be given on oath or by declaration or certificate, in accordance with Rule 55 of the Magistrates' Courts Rules, 1952, in the form prescribed by Form 111 or 113 or 114 of the Magistrates' Courts (Forms) Rules, 1952.

" 4. The scope of the new procedure, as set out in section 1 (1) of the Act, is wide, but it is not the intention that the new procedure should be used in all cases within its scope. It rests with the prosecution to initiate the new procedure, where it appears to them to be appropriate, by serving the notice and statement of facts on the accused with the summons; but if they do so, and if the accused submits a written plea of guilty, it will still remain open to the court, under section 1 (2) (*b*), if it considers that a particular case should not be dealt with under the new procedure, to adjourn the trial and deal with the information as if the use of the new procedure had not been initiated.

" 5. In paragraph 28 of their Report the Departmental Committee said that they had come to the conclusion that any new procedure should be confined in its operation to those cases which the experience of the courts has shown can safely be dealt with in the absence of the defendant. That is also the view of the Secretary of State; the purpose of the new procedure is to save the time spent by witnesses who at present have to attend court to prove the case although the defendant, who does not attend, does not deny his guilt, and it is not the intention that the introduction of the new procedure should lead to trial in the defendant's absence where the courts would at present insist on his attendance.

" 6. In a circular of today's date the Secretary of State is advising Chief Constables that the use of the new procedure should not be initiated: —

(a) In cases of a kind in which the courts are at present accustomed to insist on the defendant's attendance.

(b) In any other case the particular facts of which render it unsuitable to be disposed of in the defendant's absence.

(c) In any case in which a juvenile and an adult are jointly charged, since the terms of sections 34 and 55 of the Children and Young Persons Act, 1933, render the new procedure inappropriate where a juvenile is concerned.

(d) For any offence of motor racing on the highway, contrary to section 13 of the Road Traffic Act, 1930, since disqualification must be imposed on conviction of that offence, unless the court for special reasons orders otherwise, and the terms of the latter part of proviso (iii) to section 1 (2) of the Act have the effect that the hearing would in any event have to be adjourned on the conviction of an absent defendant.

(e) For any offence which is punishable on a second conviction by a term of imprisonment exceeding three months, unless it is known that the accused has no previous conviction of that offence.

(f) Where the accused is charged with more than one offence, and one or more of the offences is outside the scope of the new procedure.

(g) For any offence for which there is a right to claim trial by jury, although the maximum sentence on summary conviction does not exceed three months' imprisonment.

" 7. The use of the new procedure is not confined to cases in which the police prosecute. Section 1 (4) makes special provision in respect of certain offences prosecuted by the Ministry of Pensions and National Insurance, and other government departments and local authorities may initiate the use of the new procedure. The police have been asked to advise a private prosecutor who wishes to use the new procedure to consult the clerk to the justices so that the effect of the statutory provisions can be explained to him.

" 8. Section 1 (2) of the Act provides that where the clerk of the court receives a notification in writing purporting to be given by the accused or by a solicitor acting on his behalf that the accused desires to plead guilty without appearing before the court, the clerk shall inform the prosecutor of the receipt of the notification, and if at the time and place appointed for the trial or adjourned trial of the information the accused does not appear and it is proved to the satisfaction of the court, on oath or in the prescribed manner, that the notice and the statement of facts have been served upon the accused with the summons, then:—

(a) the court may proceed to hear and dispose of the case in the absence of the accused, whether or not the prosecutor is also absent, in like manner as if both parties had appeared and the accused had pleaded guilty; or

(b) if the court decides not to proceed under the new procedure, it shall adjourn or further adjourn the trial for the purpose of dealing with the information as if the notification had not been given.

" 9. The provisos to section 1 (2) set out certain provisions of the nature of safeguards:—

(i) If at any time before the hearing the clerk receives a written intimation, purporting to be given by or on behalf of the accused, that he wishes to withdraw the notification of his intention to plead guilty, the clerk shall inform the prosecutor, and the court shall deal with the information as if the section had not been passed.

(ii) Before accepting the plea of guilty and convicting the accused in his absence the court shall cause the notification and statement of facts, including any submission received with the notification which the accused wishes to be brought to the attention of the court with a view to the mitigation of sentence, to be read out before the court.

(iii) If the court proceeds to hear and dispose of the case in the accused's absence under section 1 (2) of the Act, it shall not permit any statement to be made by or on behalf of the prosecutor with respect to any facts relating to the offence charged other than the statement of facts, except on a resumption of the trial after an adjournment

> after conviction, and shall not without so adjourning sentence the accused to any term of imprisonment or to any other form of detention, or order him to be subject to any disqualification. The prosecution may not, therefore, add to the statement of facts except at an adjourned hearing, the adjournment having been ordered after conviction. If the court decides to adjourn, the accused must be given notice of the reason for the adjournment (see para. 11).

" 10. The court cannot without adjourning sentence the accused to imprisonment or detention, or order him to be subject to any disqualification. Because of the requirements of section 3 (5) and section 7 (3) of the Criminal Justice Act, 1948, the absence of the defendant will also preclude the making of a probation order or of an order for conditional discharge. In paragraph 45 of their Report the Departmental Committee said: ' . . . we think that the courts will also adjourn, and summon the defendant, where they have it in mind to impose a large fine, or where they regard it as desirable to have information about his means.' In the course of the Debates on the Bill in the House of Lords the Lord Chancellor quoted this paragraph with approval and expressed the hope that magistrates would pay attention to it.

" 11. Subsection (3) of section 1 provides that where the court adjourns the trial because it decides not to proceed to hear and dispose of the case before it under the new procedure, or where it adjourns on the occasion of the accused's conviction in his absence, there shall not be power to issue a warrant for the accused's arrest; and further provides that in relation to such an adjournment the notice required by section 14 (2) of the Magistrates' Courts Act, 1952 (which provides that an adjourned trial shall not be resumed unless the court is satisfied that the parties have had adequate notice thereof), shall include notice of the reason for the adjournment.

" 12. If the accused does not appear at the adjourned hearing, and the court is satisfied that he has had adequate notice of the time and place of the hearing, it is open to the court to proceed to sentence in his absence; but the Departmental Committee said (paragraph 33 of the Report): ' . . . we do not suppose that many courts would proceed to pass a sentence of imprisonment in his absence, since, if the information is substantiated on oath and the court thinks it undesirable, by reason of the gravity of the offence, to continue the trial in the absence of the accused, they may issue a warrant for his arrest (Magistrates' Courts Act, 1952, s. 15 (2)). We think that most courts would take the latter course. The warrant can, in a proper case, be endorsed for bail.' The Secretary of State agrees with the Committee; in his view it would require most exceptional circumstances to justify the passing of a sentence of imprisonment in the defendant's absence.

" 13. Subsection (4) of section 1 contains special provisions so that where the court convicts the accused of offences in connection with the payment of National Insurance contributions, and it is proved that notice of intention to prove failure to pay other contributions has been served on the accused with the summons, and the clerk of the court has received a statement in writing purporting to be made by the accused or a solicitor acting on his behalf to the effect that if the accused is convicted in his absence he desires to admit failing to pay the other contributions so specified or any of them, then the court can order the payment of those contributions as if the failure to pay had been proved.

" 14. Subsection (5) of section 1 gives the Secretary of State power by statutory instrument to specify offences to which the new procedure shall not apply; he has no present intention of making an instrument under this subsection, but copies of any instruments that may be made will be sent to the courts.

" 15. Where the new procedure is used the accused will receive the summons and Forms 1 and 2 (set out in the Schedule to the Rules). He should also be sent a form on which to plead guilty if he chooses to send in a written plea of guilty. This form is not to be prescribed, but a form on the lines of that attached as an appendix to this circular may be thought suitable. In addition a form of acknowledgment of the service of the summons should be enclosed unless personal service is to be effected (see para. 27).

Proof of identity of the driver of a vehicle

" 16. Section 2 of the Act, which is also to come into operation on 6th September, 1957, provides that where it is proved that a requirement under section 113 (3) of the Road Traffic Act, 1930, as extended by section 32 of the Road Traffic Act, 1956, to give information as to the identity of the driver of the particular vehicle on the particular occasion to which the information relates has been served on the accused by post, and a statement in writing is produced to the court purporting to be signed by the accused that the accused was the driver of the vehicle on that occasion, the court may accept that statement as evidence that the accused was the driver of that vehicle on that occasion. Proof of service of the requirement may be given on oath or by certificate in accordance with Rule 55 of the Magistrates' Courts Rules, 1952, in the form prescribed by Form 114 of the Magistrates' Courts (Forms) Rules, 1952.

The new procedure for the proof of previous convictions in the absence of the defendant

" 17. Section 3 of the Act, which also comes into operation on 6th September, 1957, provides that where a person is convicted of a summary offence by a magistrates' court other than a juvenile court, and it is proved to the satisfaction of the court, on oath or in the prescribed manner, that not less than seven days previously a notice was served on the accused in the prescribed form and manner specifying any alleged previous conviction of the accused of a summary offence proposed to be brought to the notice of the court in the event of his conviction of the offence charged, and the accused is not present in person before the court, the court may take account of any such previous conviction so specified as if the accused had appeared and admitted it.

" 18. Section 6 (2) of the Act provides that the Act shall be construed as one with the Magistrates' Courts Act, 1952. The term ' summary offence ' in section 3 is, therefore, to be interpreted in the light of the definition in section 125 of the Act of 1952, which provides that ' summary offence ' means an offence which, if committed by an adult, is triable by a magistrates' court (whether or not it is also triable on indictment) except an offence triable by a magistrates' court with the consent of the accused under section 19 of the Act of 1952 or section 5 of the Newspaper Libel and Registration Act, 1881. The new procedure for the proof of previous convictions in the absence of the defendant will, therefore, be available:—

(a) where the defendant is convicted by a magistrates' court of a purely summary offence, or of an offence to which section 18 of the Magistrates' Courts Act, 1952, applies, *i.e.*, a ' hybrid ' offence which is triable either summarily or on indictment, but not where he is convicted summarily under section 19 of the Act of an indictable offence;

(b) in respect of a previous conviction of a purely summary offence or a ' hybrid ' offence, and in the latter case whether the conviction was a summary conviction or a conviction on indictment. Thus, a previous conviction at quarter sessions for dangerous driving may be proved by this procedure in a magistrates' court, but not a previous conviction for indecent assault (whether on indictment or summarily).

" 19. The notice of the intention to cite previous convictions is to be in the form of Form 3 in the Schedule to the Rules (see Rule 2 (1)), and Rule 2 (2) provides that service of the form may be effected by delivering it to the person to whom it is directed or sending it by post in a registered letter addressed to him at his last known or usual place of abode. Proof of service of the notice may be given on oath or by a declaration or certificate in accordance with Rule 55 of the Magistrates' Courts Rules, 1952, in the form prescribed by Form 111 or 113 or 114 of the Magistrates' Courts (Forms) Rules, 1952.

" 20. The Secretary of State is advising Chief Constables, in a circular issued today, that while the statutory requirement is that the notice of intention to cite previous convictions shall be served on the accused not less than seven days before the conviction, the notice should be served with the summons if the necessary information is then available, and if not as soon as possible thereafter.

" 21. The new procedure for the proof of previous convictions, introduced by section 3, is independent of the new procedure for the acceptance of a plea of guilty by post which is introduced by section 1. It applies over a wider field, since the court may allow this method of proof following any conviction of a ' summary ' offence, including cases in which the accused appears by counsel or solicitor, and irrespective of whether the accused has sent in a written plea of guilty. Care should in all cases be taken to ensure that a copy of the notice served on the accused is not inadvertently brought to the notice of the court before the court announces that it has convicted the accused.

Arrest of the accused on non-appearance

" 22. Section 4 of the Act, which came into operation on 6th June, 1957, amends section 15 of the Magistrates' Courts Act, 1952, with the effect that, where a court adjourns after having on that or on a previous occasion received any evidence or convicted the accused on his pleading guilty under section 13 (3) of the Act of 1952 or section 1 (2) of the Act of 1957, the court shall not issue a warrant under section 15 of the Act of 1952 unless it thinks it undesirable, by reason of the gravity of the offence, to continue the trial in the absence of the accused.

" 23. In the application of this amendment to cases dealt with under section 1 of the Act of 1957 there must be borne in mind the further restriction imposed by section 1 (3) (see para. 11). If the court decides to adjourn such a case after convicting the accused, it cannot on that occasion issue a warrant of arrest but must give the accused notice of the adjournment and of the reason therefor; if he does not appear at the adjourned hearing, a warrant may then be issued to compel his attendance if the court thinks it undesirable, by reason of the gravity of the offence, to continue the trial in his absence, and is satisfied that he has had adequate notice of the time and place of the hearing.

Mitigation of penalties

"24. Section 5, which came into operation on 6th June, 1957, amends section 27 of the Magistrates' Courts Act, 1952, so that the powers of magistrates' courts to mitigate penalties shall extend, and shall be deemed always to have extended, to offences under any enactment whether passed before or after the commencement of that Act, except where an Act passed after 31st December, 1879, expressly provides to the contrary.

"25. Chief Constables are being asked to arrange for clerks to the justices to be consulted with a view to fixing a convenient date, not before 6th September, 1957, for bringing into use the new procedure introduced by section 1 of the Act, and are being advised that no notices under section 1 (1) or section 3 should be served before 6th September, since the Rules, which prescribe the forms of the notices, do not come into operation until that date.

"26. Rule 3 of the Rules, which is unconnected with the 1957 Act, makes a general amendment in Rule 76 of the Magistrates' Courts Rules, 1952. Paragraph (2) of Rule 76 is extended so that, in relation to a summons served on or after 6th September, 1957, the paragraph will apply to a summons served by leaving it for the accused with some person at his last known or usual place of abode as it applies at present to a summons served by registered post. A form or slip on which the accused can acknowledge receipt of the summons should therefore be enclosed wherever a summons is served other than personally."

APPENDIX

Notice of plea of guilty

To the Clerk of the Magistrates' Court
(Address)

Plea of Guilty

I have read the Statement(s) of Facts relating to the charge(s) of which is/are to be heard by the Magistrates' Court on .

I plead guilty to the charge(s) and I desire that the court should dispose of the case in my absence. I wish to bring to the court's attention the mitigating circumstances set out below.

(Signed)

Mitigating Circumstances

NOTES 1: *If you intend to consult a solicitor about the case you would be well advised to do so before returning this form.*

2: If you propose to attend court, please fill in the form overleaf.

If you propose to attend court, and are willing to answer any of the questions below, and to return this form to the clerk to the justices at the address overleaf within 7 days, time and inconvenience may be saved.

1. Do you intend to deny the charge/any of the charges .... if so, you should appear with any witness you may wish to bring.
2. Do you intend to admit the charge/any of the charges.........

You are at liberty at any time to change your mind as to whether or not you will appear. If you do change your mind, please let the clerk know before the hearing that you have done so.

If you intend to appear by solicitor or counsel, you would be well advised not to complete this form without consulting your solicitor.

Summary Justice

Animals

Causing a dog unnecessary suffering contrary to section 1 of the Protection of Animals Act, 1911, by shutting it in a car boot where it died of heatstroke; fined £5 with £9 4s. costs; Hill: Tiverton Magistrates' Court (*Manchester Guardian*, August 23).

Permitting a bull "to be at large in a field or enclosure through which there was a public footpath"; fined £3 with 5s. costs; Brown: Hackthorpe Magistrates' Court (*Manchester Guardian*, August 13).

Electricity

Maliciously consuming 47 units of electricity contrary to section 10 of the Larceny Act, 1916, by placing a wire across the contact terminals in the main fuse box (thus running the risk of electrocution); fined £2; Callaghan: Halifax Magistrates' Court (*Manchester Guardian*, August 15).

Larceny

Three youths, all unemployed, picked four plums from a tree and ate them ; fined £1 each ; Flaherty : Wimbledon Magistrates' Court (*The Times*, August 20).

National assistance

Persistently neglecting to maintain himself while obtaining national assistance, persistently neglecting to maintain his wife, and persistently neglecting to maintain his daughter ; sentenced to three months' imprisonment on each count, two of the sentences to run concurrently ; Dalton : Chatham Magistrates' Court (*Daily Telegraph*, August 13).

Obtaining £91 from the National Assistance Board by making false representations ; fined £20 ; Blissett : Bognor Magistrates' Court (*Evening Standard*, August 8).

Public health

Disobeying a nuisance order directing him to clean his home, contrary to section 95 of the Public Health Act, 1936 ; fined £5 with £3 3s. costs, and ordered to start cleaning his house during the following week-end or be fined £2 each day from the following Monday onwards ; Fitchett : Tettenhall Magistrates' Court (*Manchester Guardian*, August 23).

Depositing litter and rubbish in a country lane near Rochford contrary to a local by-law ; fined £2 with 25s. costs ; Liggens : Southend Magistrates' Court (*Daily Telegraph*, August 8).

Road traffic

Interrupting the free passage of the highway contrary to section 78 of the Highways Act, 1835, by opening the door of a stationary car and striking a motor-cyclist with it ; fined £2, with £3 3s. costs ; Cock : Gravesend Magistrates' Court (*Manchester Guardian*, August 10).

Not " having direction and government over a horse drawing a cart," contrary to a provision of section 28 of the Town Police Clauses Act, 1847 ; two men each fined 5s. ; McCann : Widnes Magistrates' Court (*Liverpool Echo*, August 12).

Shops Act

Opening a butcher's shop on Sunday contrary to section 22 of the Shops Act, 1950. The partners in a butchers' business allowed customers to collect meat which had been paid for on Saturday from the shop refrigerator on Sunday morning ; fined 50s. each ; Davis : Birmingham Magistrates' Court (*Manchester Guardian*, August 17).

Case and Comment *

Extradition—*Kenya—Larceny as a servant and fraudulent false accounting*

Re DRUMMOND [1] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Byrne JJ.: July 26, 1957) (*The Times*, July 27, 1957).

D., an accountant, was arrested under the Fugitive Offenders Act, 1881, on charges of larceny as a servant and fraudulent false accounting alleged to have been committed in Kenya in 1955 and involving some £200. In July, 1957, the metropolitan magistrate sitting at Bow Street ordered that he should be extradited to Kenya to stand his trial. D. now applied with the leave of the court for a writ of *habeas corpus* on the ground that it would be unjust, oppressive and too severe a punishment.

Held, refusing the motion, that a prima facie case had been made against D. and the application for extradition had been made in good faith; the sum involved was not trivial and there had not been unreasonable delay; in view of air travel it was no longer possible to object to the distance to Kenya and in the circumstance the applicant must return to custody pending extradition. [J. D. P.]

COMMENTARY. The Fugitive Offenders Act, 1881, makes provision for the return of a fugitive from a part of Her Majesty's dominions where he is accused of committing an offence. Under section 10 a superior court has power to discharge the fugitive because of the trivial nature of the case, because the application is not made in good faith, or because to return the fugitive would be unjust or oppressive or too severe a punishment, having regard to distance, facilities for communication and all the circumstances of the case.

Evidence—*Being in possession of housebreaking implements by night without lawful excuse—evidence to rebut defence of lawful possession*

R. *v*. HODGES [2] (Court of Criminal Appeal: Hilbery, Barry and Hinchcliffe JJ.: July 29, 1957).

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* Reported, unless otherwise stated, by Henry Palmer and J. D. Pennington, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab), Barrister-at-Law.

[1] For the applicant: *J. B. R. Hazan* (instructed by Victor Lissaek). For the Government of Kenya: *John Mathew* (instructed by Charles Russell & Co). For the Governor of Brixton Prison: *R. E. Seaton* (instructed by Director of Public Prosecutions).

[2] For the appellant: *Jean M. Southworth* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *P. Bennett* (instructed by Ray and Vials, Northampton).

H. was convicted at quarter sessions of being in possession of housebreaking implements by night without lawful excuse, and was sentenced to three years' imprisonment. The evidence at the trial was that H. was found by night having in his possession two skeleton keys. H. said that he had filed down the keys, or one of them, for use in order to obtain access to his lodgings. The prosecution called G. and F. to say that about ten days before the offence H. had shown the two keys to them and had invited them to join him in an office-breaking enterprise. H. appealed to the Court of Criminal Appeal on the ground that the evidence of G. and F. was improperly admitted.

Held, dismissing the appeal, that the evidence was rightly admitted. The prosecution had to prove that the accused man was in possession of housebreaking implements by night without lawful excuse. It was clearly relevant to put before the jury the conversation with G. and F. in order to rebut any defence by H. that he had lawful possession of the keys on the night in question. It was for the accused to prove that some lawful excuse for the possession of the implements existed and this court was satisfied that, in order to enable the jury to arrive at a conclusion as to whether or not an excuse existed, the evidence of G. and F. was relevant and admissible. The appeal would, therefore, be dismissed. [H. P.]

COMMENTARY. Under section 28 of the Larceny Act, 1916, it is a misdemeanour to be found by night in possession of housebreaking implements, without lawful excuse, " the proof whereof shall lie on such person." It seems that, notwithstanding the words of the statute, the only burden on the prisoner is the evidential burden of introducing so much evidence as might raise a reasonable doubt in the minds of the jury, and that the onus is then on the Crown to prove that he had no lawful excuse. See *R.* v. *Ward* [1915] 3 K.B. 696 and Glanville Williams, *The Criminal Law*, section 229.

Homicide—*Diminished responsibility—mental defective—sentence*

R. *v.* SPEAKE [3] (Court of Criminal Appeal: Hilbery, Barry and Hinchcliffe JJ.: July 29, 1957) (*The Times,* July 30, 1957).

S. was tried at Assizes for the murder of a young boy. S. had lured the boy to a lonely spot, had indecently assaulted him and when the boy had said he would tell his father had brutally battered him to death. The medical evidence before the court was that S.

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[3] For the appellant: *G. C. Baker Q.C., Conway Clifford* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *R. C. Micklethwait Q.C., R. V. Cusack* (instructed by the Director of Public Prosecutions).

was just on the certifiable side of the border of feeble-mindedness. The jury found that S. was a person with diminished responsibility. S., who was under twenty-one years of age, was accordingly convicted of manslaughter and he was sentenced to imprisonment for life. On appeal to the Court of Criminal Appeal it was argued that, as the medical evidence at the trial showed that S. was a mental defective, the proper sentence was an order under section 8 of the Mental Deficiency Act, 1913.

Held, dismissing the appeal, that the finding of the jury that S. was a person with diminished responsibility did not mean the jury had formed the view that S. was a certifiable mental defective. It was clear that section 17 of the Criminal Justice Act, 1948, left it open to a court, after considering the character of the accused and his physical and mental condition, to imprison the accused. In the circumstances of the present case the court was not bound to take one of the courses open to them under section 8 of the Mental Deficiency Act, 1913. That section was permissive and was intended to enlarge the powers of a court dealing with a person shown to be a mental defective for a criminal offence punishable in the case of an adult by imprisonment. Section 8 in no sense restricted the court to taking one of the courses provided ; it was a matter of discretion for the trial judge, and accordingly the appeal would be dismissed. [H. P.]

COMMENTARY Section 8 of the Mental Deficiency Act, 1913, provides that a court, if satisfied on medical evidence that a convicted person is a defective, *may* either postpone sentence with a view to obtaining an order that he be sent to an institution or placed under guardianship, or itself make such an order in lieu of sentence. This provision applies only to offences punishable with imprisonment. By section 17 (2) of the Criminal Justice Act, 1948, no court shall impose a sentence of imprisonment on a person under twenty-one years of age unless the court is of opinion that no other method of dealing with him is appropriate.

Before the Homicide Act, 1957, Speake would presumably have been convicted of murder and section 8 of the Mental Deficiency Act would not have been applicable. The view of the Royal Commission on Capital Punishment on the situation which has thus arisen under the 1957 Act is of interest (Report, para. 354; Cmd. 8932):—

"Under the existing law [*sc.* in 1953, when the Report was presented], if a mental defective who is convicted of a non-capital offence is committed to an institution by an order of a court under section 8 of the Mental Deficiency Act, 1913, he becomes subject to the general law relating to mental defectives, and the consent of the Secretary of State is not required before he can be discharged. If this provision were extended to persons convicted of murder, there must be some risk of the premature discharge of persons likely to be a danger to the public, who ought, in the interests of society, to be detained for a longer period and in some cases for life."

The present case shows that the court has power to obviate this risk by imposing a sentence of imprisonment in appropriate cases.

Indictment—*Receiving goods obtained under circumstances amounting to a misdemeanour*

R. *v.* NEW [4] (Central Criminal Court: The Common Sergeant: June 16, 1957).

N. was indicted upon an indictment containing two counts, one of which was that he received goods obtained under circumstances amounting to a misdemeanour under section 13 (1) of the Debtors Act, 1869, contrary to section 33 of the Larceny Act, 1916.

It was alleged that some time between February 19, 1957, and March 9, 1957, N. received a record player and a wireless set knowing the same to have been obtained under circumstances amounting to a misdemeanour under section 13 (1) of the Debtors Act, 1869, that is, incurring a debt or liability obtaining credit under false pretences or by means of other fraud. The second count alleged a similar offence.

Counsel for the prisoner moved to quash the indictment upon the grounds that it disclosed no offence in law, and cited *R.* v. *Schweller,* 18 Cr.App.R. 52 (Archbold, p. 783). He sought to distinguish the cases of *R.* v. *Kutas,* 17 Cr.App.R. 179, and *R.* v. *Klein*, 23 Cr.App.R. 185, on the ground that the judgments in those cases went further than was necessary to decide the points there at issue.

Counsel for the Crown conceded that the indictment was a novel one and said that the reason for this might be that it had hitherto been thought that *R.* v. *Schweller* was an authority against such an indictment. In *R.* v. *Schweller* the indictment was bad on the face of it because the particulars disclosed no circumstances amounting to any misdemeanour known to lay, and that was sufficient reason for the decision of the court.

R. v. *Klein* was decided after *R.* v. *Schweller* and expressly reaffirmed the decision in *R.* v. *Kutas.* The reasoning in *R.* v. *Klein* and in *R.* v. *Kutas* was directly in point. He referred also to *R.* v. *Misell,* 19 Cr.App.R. 109.

Held, the indictment was good. The point was covered by the

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[4] For the prosecution: *J. H. Buzzard* (instructed by the Solicitor for the Metropolitan Police). For the defence: *W. E. Denny* (instructed by Wedlake, Saint & Co.).

ratio decidendi in *R.* v. *Kutas* and *R.* v. *Klein*. The decision in *R.* v. *Schweller* could clearly be explained by the fact that in the counts upon which the court there quashed the convictions the particulars alleged that the prisoner had received property "knowing the same to have been obtained on credit under false pretences or by means of fraud other than false pretences." There was no offence known to the law of obtaining credit by false pretences or other fraud, and the counts were therefore bad upon the face of them. [J. H. Buzzard, *Barrister-at-Law*.]

COMMENTARY. Whereas the receiving under section 95 of the Larceny Act, 1861, was required to be such as "is made a misdemeanour *by this Act*," the Larceny Act, 1916, s. 33, which replaced it, is satisfied if the property is "obtained *in any way whatsoever* under circumstances which amount to a misdemeanour." Provided, therefore, that the indictment specifies a misdemeanour known to the law (which the indictment in *R.* v. *Schweller* failed to do) by which the property was obtained, it is good.

Under section 13 (1) of the Debtors Act, 1869, it is the obtaining credit in incurring any debt or liability, and not the obtaining of goods, which is the offence. It seems, however, that section 33 is satisfied if the obtaining of the goods is an integral part of the transaction which comprises the misdemeanour specified in the indictment. So in *R.* v. *Klein* the misdemeanour specified was a conspiracy to defraud, in pursuance of which the goods were obtained, and the indictment was held good.

Preventive Detention—*Appropriate length of term*

R. *v.* SWABY[5] (Court of Criminal Appeal: Hilbery, Barry and Hinchcliffe JJ.: July 29, 1957).

S. was convicted at quarter sessions of housebreaking and sentenced to five years' preventive detention. On appeal to the Court of Criminal Appeal against sentence:—

Held, that although the appellant had a deplorable record, he was only thirty years and six months of age and ought perhaps still to be considered as one who was not hopelessly irredeemable. Five years was not, as this court had previously pointed out, an appropriate term for a sentence of preventive detention (eight, ten or twelve years were appropriate sentences) and accordingly a sentence of five years' imprisonment would be substituted for that of five years' preventive detention. [H. P.]

COMMENTARY. Five years is not an appropriate period for a sentence of preventive detention except in the case of an old man whom a court might wish should not spend his last days in prison. In other cases seven years is the irreducible minimum and the sentence should generally be for eight years or even longer: *R.* v. *Sedgwick* (1950) 34 Cr.App.R. 156.

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[5] The appellant appeared in person. The Crown was not represented.

Verdict — *Conspiracy — disagreement of jury on this count inconsistent with finding on ulterior crime*

R. *v.* BEACH AND OWENS [6] (Court of Criminal Appeal: Lord Goddard C.J., Devlin and Diplock JJ.: July 29, 1957) (*The Times,* July 30, 1957).

B. and O. were tried at the Central Criminal Court on an indictment containing two counts. The first count charged a conspiracy to pervert the course of public justice in connection with O.'s previous trial at quarter sessions by altering O.'s appearance so as to impede his recognition by witnesses, and the second count charged O. (the defendant in the previous trial) with an attempt to pervert the course of public justice and B. (O.'s solicitor) with aiding and abetting that offence. It was common ground at the trial that what was done in respect of the alteration of O.'s appearance was done on B.'s advice, and the prosecution said that the defendants' purpose was to pervert the course of justice, whereas the defendants said that their purpose was to assist the course of justice. The jury disagreed upon the first count but convicted both defendants on the second count. On appeal to the Court of Criminal Appeal:—

Held, allowing the appeal, that the verdict of the jury on the second count was inconsistent with their disagreement on the first count. This court had pointed out before the unfortunate results which might occur from including counts of conspiracy in an indictment when the facts proved on the conspiracy were the same as those which had to be proved on the other counts. In the present case the jury had to answer the same question on each count, namely, were the defendants attempting to pervert the course of justice. The jury's finding of guilty on the second count was, therefore, inconsistent with their disagreement on the first count. As the evidence was identical on both counts, the right direction to the jury would have been that they must either convict on both or acquit on both. The verdict on the second count would accordingly be quashed. [H. P.]

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[6] For the appellant Beach: *Gilbert Beyfus Q.C., L. F. Belcourt* (instructed by S. Rutter & Co.). For the appellant Owens: *H. M. B. Torrance* (instructed by S. Rutter & Co.). For the Crown: *R. E. Seaton, E. J. P. Cusson* (instructed by the Director of Public Prosecutions).

COMMENTARY. A conspiracy to commit a crime does not merge in the completed crime and, therefore, a conviction both for the completed crime and a conspiracy to commit it is possible. Where the only evidence of conspiracy is the collaboration of the parties in the completion of the ulterior crime, the only logical verdicts are guilty of both conspiracy and the ulterior crime, or, not guilty of both. Thus, in *R.* v. *Cooper and Compton* (1947) 32 Cr.App.R. 102, on such facts the court quashed a verdict of guilty of conspiracy as inconsistent with a verdict of not guilty of larceny. Conversely, in the present case, the verdict of guilty of attempt logically required a verdict of guilty of conspiracy, and the disagreement of the jury was inconsistent with it.

Verdict—*Recommendation to mercy after redirection on value of circumstantial evidence*

R. *v.* SYKES [7] (Court of Criminal Appeal: Lord Goddard C.J., Slade and Gorman JJ.: July 8, 1957) (*The Times*, July 9, 1957).

S. was convicted at the Central Criminal Court of arson. The jury, after being out for about an hour, came back and said they were not in agreement. They were then given a further direction, and the value of circumstantial evidence in the circumstances of the case was pointed out to them. After a further twenty minutes' retirement the jury returned and said: " Guilty, but with a recommendation for mercy owing to the circumstantial evidence." The clerk of the court then said to the jury: " You find the prisoner guilty, and that is the verdict of you all? " and the foreman then replied that it was. On appeal to the Court of Criminal Appeal:—

Held, dismissing the appeal, that the court could see no reason for saying that this was not a perfectly definite verdict of guilty, repeated by the foreman of the jury when he was asked if that was the verdict of them all. [H. P.]

COMMENTARY. If the jury were satisfied beyond reasonable doubt that the accused was guilty, the fact that the evidence was circumstantial was entirely irrelevant to the sentence. The reference to circumstantial evidence would seem to indicate that the jury, or some of them, were not so satisfied. *Cf.* Glanville Williams, *The Proof of Guilt*, 244: " . . . a jury's verdict of ' guilty with a recommendation to mercy ' should be suspect: one sometimes cannot be sure that it does not mean ' guilty of the *act* but no criminal intent and therefore a recommendation to mercy.' Yet judges frequently accept this verdict without question as one of guilty." In the present case there were added grounds for suspicion.

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[7] For the appellant: *K. A. Richardson* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Maxwell Turner* (instructed by the Solicitor, Metropolitan Police).

There is an obvious risk of a compromise verdict where the jury find difficulty in agreeing and are exhorted by the judge into trying to achieve unanimity. In the present case, when the jury returned after their first retirement, the recorder emphasised the inconvenience and expense which would be occasioned if they failed to agree, that a new trial would be necessary and that another jury would have to do their work. See Glanville Williams, *op. cit.* 248 *et seq.*; Devlin J., *Trial by Jury* 48 *et seq.*; *R.* v. *Rossi* [1957] Crim.L.R. 258.

Wild Birds—*Quail—whether contract to buy for table purposes illegal*

BRUNTUN *v.* E. W. CAMPION & SONS (POULTERERS), LTD.[8] (Q.B.: Lord Goddard C.J.: July 16 and 19, 1957) (*The Times*, July 20, 1957).

By section 6 of the Protection of Birds Act, 1954, it is provided that " If . . . any person sells, offers for sale or has in his possession for sale . . . a dead wild bird other than a bird [included in the Third Schedule] he shall be guilty of an offence . . ." " Quail, common " appears as a wild bird in the First Schedule, but it does not appear in Schedule 3. B. imported eggs from Malaya for the purpose of breeding quail for the table. It was alleged that these eggs came from a species known as *coturnix japonica*; and that this species differed from the common quail (or *coturnix coturnix*) in that it was bred in captivity. A certain group of the species known as the Chinese (or " painted ") quail was not only bred in captivity, but no longer existed in a wild state; it had lost its power of flight and its eggs had to be incubated artificially. Without human help the group would have become extinct. In an action to determine whether a contract to buy B.'s quails for table purposes was illegal, as contravening the Act:—

Held, that the eggs which B. imported came from the species *corturnix japonica*; and that a contract to buy the quails for table purposes was not illegal, because the species could not be said to be wild.

[DAVID CALCUTT, *Barrister-at-Law.*]

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[8] For the plaintiff: *G. R. F. Morris* (instructed by Lawrence, Messer & Co.). For the defendant: *Peter Crawford* (instructed by Lawrence, Graham & Co.).

Acts and Orders[*]

Agriculture

AGRICULTURE ACT, 1957 (5 & 6 Eliz. 2, c. 57): operative September 1, 1957, except section 36 (3), which was operative from August 5, 1957. The objects of this Act are to make further provision about guaranteed prices and assured markets for agricultural produce in the United Kingdom; to authorise the payment of grants for long-term improvements of agricultural land in the United Kingdom; to make fresh provision for the development of the pig industry in Great Britain; and to authorise payments into the Exchequer of Northern Ireland on account of expenses incurred for the benefit of producers of agricultural products in Northern Ireland.

Section 1 empowers the Minister by order to provide for guaranteed prices and assured markets for producers of specified crops and livestock and livestock products. Special provision is made in sections 2 and 3 to ensure the relative stability of guaranteed prices. For the protection of guarantees, orders under section 1 may require distinctive marking of the produce affected, and may include provisions as to marketing, accounts, inspection, etc. (s. 5), and in respect of imported livestock (s. 6). Penalties are prescribed by section 7. The penalty for contravening any provision of an order made under section 5 and 6 is, on summary conviction, a fine not exceeding £100 or imprisonment for three months, or both (s. 7 (1)). If any person wilfully obstructs an authorised officer he is to be liable on summary conviction to a fine not exceeding £20 for the first offence, and to a fine not exceeding £50 or imprisonment for one month, or both, for any subsequent offence (s. 7 (2)).

Section 7 (3) prescribes penalties for (a) making false statements in order to obtain certain moneys payable under the Act; (b) altering or defacing any mark applied to produce, with intent to deceive; (c) applying marks to produce with intent to deceive, and (d) making certain false entries in books, accounts, etc. The penalty on summary conviction is a fine not exceeding £100 or imprisonment for three months, or both; and on indictment a fine not exceeding £500 or imprisonment for two years, or both. Section 7 (4) deals with offences by bodies corporate.

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[*] Prepared by F. Maurice Drake, Barrister-at-Law.

The Act extends to Scotland and (except for Part II which deals with the pig industry) to Northern Ireland.

Animals

NEW FOREST (CONFIRMATION OF BYELAW) ORDER, 1957 (S.I. No. 1304): operative July 30, 1957. The Minister of Agriculture, Fisheries and Food confirmed a by-law made by the Verderers of the New Forest whereby the maximum payment which can be levied by the Verderers for every pig turned out in pannage time in the New Forest is increased from 1s. to 10s.

Armed Forces

NAVAL DISCIPLINE ACT, 1957 (5 & 6 Eliz. 2, c. 53): operative on a day to be appointed. This Act is the result of, though with some departures from, the recommendations of the Select Committee of the House of Commons published in House of Commons Papers, Session 1955–1956, No. 421, which should be referred to for detailed information regarding the reasons for the numerous alterations in the law. Many features of the Army Act, 1955 (3 & 4 Eliz. 2, c. 18), and the Air Force Act, 1955 (3 & 4 Eliz. 2, c. 19) (see [1955] Crim.L.R. 440), have been incorporated, so that this Act does much to standardise the discipline of the three services. No provision is made in the Act for the Women's Royal Naval Service. The main alterations in the law relating to naval discipline are:—

(1) The navy is given jurisdiction to try civil offences (except murder, treason, manslaughter, treason-felony and rape) committed on shore in the United Kingdom (s. 48).

(2) The number of persons eligible to sit on courts-martial is increased, and there are some procedural changes.

(3) Offences specifically relating to aircraft become naval offences (ss. 19–22), and charges which can be made against the commander of a ship may now be made against the commander of an aircraft (ss. 2, 3).

(4) Attempts to commit an offence are chargeable in the same way as actual offences and, except where death is involved, attract the same penalties (ss. 40, 69), and persons who aid and abet in the commission of an offence are to be deemed guilty of the offence itself (s. 41).

(5) Some new offences, formerly chargeable under the civil law, are included in the Act, *e.g.*, aiding the enemy whilst a prisoner of war (s. 5), and failing to report or apprehend absentees and deserters (s. 18).

(6) The scale of punishments has been reviewed, and punishment by fine introduced for officers only (s. 43); maximum penalties have in all cases been reduced. The death penalty is abolished for all specifically naval offences except various forms of treason and the worst kinds of mutiny (ss. 2–5, 9, 10).

(7) The list of offences triable by a disciplinary court instead of by court-martial is extended (s. 50).

(8) The Admiralty, when reviewing a trial, are given powers similar to those granted by section 113 of the Army Act, 1955 (ss. 70–73), and certain special powers (ss. 74–77).

(9) Members of Commonwealth and foreign navies, when working with the Royal Navy, are to be subject to the Act (s. 111 (6)).

(10) The Admiralty may, in certain circumstances, dispense with the trial of a rating who confesses to desertion (s. 74).

The Act applies to Scotland and Northern Ireland with the necessary modifications contained in sections 123 and 124 respectively.

And see above, p. 669.

Bastardy and Legitimation

AFFILIATION PROCEEDINGS ACT, 1957 (5 & 6 Eliz. 2, c. 55): operative April 1, 1958. This Act consolidates, with corrections and improvements, various provisions taken from seven statutes. The various sections of the Act deal with the following matters: commencement of proceedings (s. 1); time for application for summons (s. 2); venue and procedure (s. 3); powers of court on hearing complaint (s. 4); persons entitled to payments under affiliation order (s. 5); duration of orders (s. 6); continuation of payments in certain cases (s. 7); appeal (s. 8); duty of putative father to notify change of address (s. 9 (1)); the penalty for failing without excuse to notify change of address is, on summary conviction, a fine not exceeding £2 (s. 9 (2)); attachment of pension or income to satisfy affiliation order (s. 10); misconduct by guardian of illegitimate child (s. 11); repeals and savings (s. 12); short title, etc. (s. 13).

The Act does not extend to Scotland or to Northern Ireland.

British Commonwealth

GHANA (APPEAL TO PRIVY COUNCIL) ORDER IN COUNCIL, 1957 (S.I. No. 1361): operative on a date to be appointed by the Governor-General; WEST AFRICAN (APPEAL TO PRIVY COUNCIL)

ORDER IN COUNCIL, 1957 (S.I. No. 1362): operative August 8, 1957. The Gold Coast (now known as Ghana) is omitted from the territories to which the West African (Appeal to Privy Council) Order in Council, 1949, applies, consequent upon the termination of the jurisdiction of the West African Court of Appeal in relation to appeals from the Gold Coast. (See S.I. 1957, No. 279: [1957] Crim.L.R. 330.) Further provision is made regulating appeals from the Court of Appeal of Ghana, which will now lie to the Judicial Committee of the Privy Council.

Customs and Excise

EXPORT OF GOODS (CONTROL) (AMENDMENT NO. 5) ORDER, 1957 (S.I. No. 1281): operative as to article 1 (4), September 1, 1957; as to remainder of the order, August 1, 1957.

The Export of Goods (Control) (Consolidation) Order, 1956 (S.I. No. 1702; [1957] Crim.L.R. 64) is amended so that (1) licences are no longer required to export some forms of selenium, certain types of seeds, ferro-phosphorus and ferro-silicon; (2) licences are required to export live cattle to any port or destination on the Continent of Europe (but this does not apply to exports of pedigree cattle or to exports from Northern Ireland); (3) licences are required to export shell eggs of domestic poultry to all destinations; (4) licences are required for the export to all destinations other than those specified in paragraph (*a*) of article 5 of the principal order, of certain types of centrifugal testing apparatus, specified forms of polytetrafluoroethylene and polytrifluorochloroethylene, and certain equipment designed to produce printed circuits (electronic assemblies). (5) Ghana is now expressly mentioned among the Commonwealth countries to which the exemption given by article 5 of the principal order applies.

For penalties for contraventions, see section 3 of the Import, Export and Customs Powers (Defence) Act, 1939.

SPIRITS CERTIFICATES REGULATIONS, 1957 (S.I. No. 1349): operative October 1, 1957. The Permits, Certificates and Stock Books Regulations, 1952 (S.I. 1952, No. 2236), are amended to permit the use of a spirit trader's consignment note or other similar document as a certificate in place of the official form hitherto issued by the Commissioners for completion by the trader. The Regulations also govern the issue and disposal of certificates which, by the Customs and Excise Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 44) are required, in certain circumstances, to accompany spirits removed from one place to another.

For penalties for contraventions, see section 98 of the Customs and Excise Act, 1952.

Emergency Laws

IRON AND STEEL SCRAP (AMENDMENT) ORDER, 1957 (S.I. No. 1271): operative July 29, 1957. The maximum prices of all specifications of iron and steel scrap set out in the Schedule are increased; and the Schedule replaces that in the 1956 Order (S.I. 1956, No. 631; [1956] Crim.L.R. 431).

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

STRATEGIC GOODS (CONTROL) (AMENDMENT No. 4) ORDER, 1957 (S.I. No. 1282): operative August 1, 1957. The Order of 1954 (S.I. No. 1622; [1955] Crim.L.R. 123) as amended, now applies in respect of the following additional goods: certain types of centrifugal testing apparatus and certain equipments designed to produce printed circuits (electronic assemblies). The principal Order prohibits the exports of these goods to prescribed countries.

For penalties for contraventions, see regulation 92 of the Defence (General) Regulations, 1939.

Factories

THERMAL INSULATION (INDUSTRIAL BUILDINGS) ACT, 1957 (5 & 6 Eliz. 2, c. 40): operative subject to section 6, on July 17, 1957. Provision is made for the thermal insulation of " industrial buildings," which are defined by section 10 as buildings which are, or which form part of, a factory within the meaning of the Factory Acts. The Minister of Power is given authority to prescribe by regulations a standard for the insulation of these buildings against loss of heat (s. 1); and local authorities are given power to reject plans of proposed industrial buildings if they do not conform to the prescribed standard (s. 2). The local authority also has power to require the removal or alteration of a building which does not conform to the prescribed standard (s. 4). Disputes between a local authority and a person proposing to erect an industrial building may be referred to the Ministry with a right of reference to the High Court of Justice by way of case stated on any point of law (s. 5). Sections 2–5 apply to buildings or extensions begun on or after January 1, 1959, or such earlier day as may be appointed (s. 6). Section 8 applies for the purposes of this Act, provisions of the Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49), as to notices, powers of entry, execution of works, etc., and also the Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 123 (relating to the powers of factory inspectors).

For penalties for contraventions and procedure, see the relevant provisions of the Public Health Act, 1936 (ss. 287, 288, 300, 301, 302).

The Act applies to Scotland (subject to section 12), but not to Northern Ireland.

Hire Purchase

ADVERTISEMENTS (HIRE-PURCHASE) ACT, 1957 (5 & 6 Eliz. 2, c. 41); operative January 1, 1958. The object of this Act is to provide that every advertisement of goods offered for disposal under a hire-purchase or credit sale scheme shall, if it includes certain information, set out clearly such prescribed information as is appropriate to that scheme. The Act applies (s. 1) to any advertisements of goods for disposal by way of hire-purchase or credit-sale which indicate the amount or percentage of any deposit or the amount of any instalment or that no deposit is payable. A credit sale advertisement of goods at a total price not exceeding £5 for any one article is not subject to the Act (s. 1 (3)). Section 2 prohibits the display or issue of any advertisement to which the Act applies unless it states clearly prescribed information. If the advertisement contains no details of payments to be made in relation to any goods the less detailed information is required in respect of those goods (s. 2 (3)). A clear distinction must be made in the advertisement between information relating to different hire-purchase or credit-sale schemes (s. 2 (5)). Section 3 makes it an offence to display or issue advertisements which do not comply with the Act, and the offender is liable on summary conviction to a fine not exceeding £50 for the first offence and £100 for any subsequent offence. A person charged with an offence has a good defence if he can prove (a) that the matters contained in the advertisement did not relate to anything to be done in the course of a business carried on by him; and (b) that the matters so contained were not (wholly or in part) devised or selected by him or by any other person under his direction or control (s. 3 (2)). There are special provisions in respect of offences committed by a body corporate (s. 3 (4) and 3 (5)). Section 4 is the interpretation section, and includes special provisions relating to advertisements contained in cinema or television programmes.

The Act extends to Scotland, but not to Northern Ireland.

Judicial Offices

JUDICIAL OFFICES (SALARIES AND PENSIONS) ACT, 1957 (5 & 6 Eliz. 2, c. 46). The salaries of the recorders of Liverpool and Manchester, of county court judges, and of metropolitan police magistrates are increased; and provision is made for further increases to be made by order subject to the draft order first being laid before and approved by resolution of each House of Parliament. Certain provisions are also made in respect of the pensions of the two said recorders. The Act is operative on July 17, 1957, when it received the Royal Assent, but the salary increases are effective from April 18, 1957.

London

The following Order has been made prohibiting waiting: S.I. No. 1426 (Windmill Street, Gravesend).

The following Order has been made detailing prescribed routes: S.I. 1425 (Hampstead).

Magistrates' Courts

MAGISTRATES' COURTS RULES, 1957 (S.I. No. 1429): operative September 6, 1957. Forms are prescribed for use in connection with the new procedure whereby in certain cases a written plea of guilty may be accepted without the accused appearing before the court, as laid down in the Magistrates' Courts Act, 1957 (5 & 6 Eliz. 2, c. 29; [1957] Crim.L.R. 547). Rule 1 prescribes the forms to be used generally; rule 2 prescribes the form to be used in giving notice under section 3 of that Act of intention to cite previous convictions and prescribes the manner in which the notice is to be served. Rule 3 amends the Magistrates' Courts Rules, 1952 (S.I. 1952, No. 2190), so as to provide that where a summons is served on the accused by leaving it at his last known or usual place of abode and the accused fails to appear, service of the summons shall *not* be treated as proved unless it is proved that the summons came to his knowledge, thus assimilating the procedure to that followed where service is by registered post.

Medicine

GENERAL DENTAL COUNCIL DISCIPLINARY COMMITTEE (PROCEDURE) RULES APPROVAL ORDER IN COUNCIL, 1957 (S.I. No. 1265): operative July 17, 1957. The Dentists Act, 1956 (4 & 5 Eliz. 2, c. 29; [1956] Crim.L.R. 351), (now consolidated with earlier enactments by the Dentists Act, 1957 (5 & 6 Eliz. 2, c. 28; [1957] Crim.L.R. 548), provides that rules may be made by the General Dental Council as to the rules of procedure and evidence to be observed in proceedings before the Disciplinary Committee. These rules are not, under the provisions of the Act, to come into force until approved by Order of the Privy Council, which is now given by this Order. The rules provide the procedure for dealing with the removal of a name from the register of dentists on disciplinary grounds or on the ground that the name was fraudulently entered, and with the restoration of a name so removed (Parts II and III), and for dealing with the removal of the right of a body corporate to carry on the business of dentistry (Part IV). Part V contains general provisions as to the conduct of hearings, evidence, and the method of voting at hearings and the right to be represented thereat.

ANCILLARY DENTAL WORKERS REGULATIONS, 1957 (S.I. No. 1423): operative August 1, 1957. Parts II to V contain general provisions governing the enrolment of classes of ancillary dental workers and the machinery for removing a name from that roll by disciplinary proceedings before the General Dental Council (as to which see S.I. 1957, No. 1265, above).

Merchant Shipping

MERCHANT SHIPPING (SAFETY CONVENTION COUNTRIES) (VARIOUS) (NO. 1) ORDER, 1957 (S.I. No. 1372): operative August 13, 1957. Hungary, Turkey and Czechoslovakia have accepted the Safety Convention.

MERCHANT SHIPPING (CERTIFICATES OF COMPETENCY AS A.B.) (BARBADOS) ORDER, 1957 (S.I. No. 1371): operative August 13, 1957. Certificates of competency as A.B. granted in Barbados and its dependencies shall have the same effect as if granted directly under the provision of section 5 of the Merchant Shipping Act, 1948, or of the regulation made under that section. Section 104 of the Merchant Shipping Act, 1894 (which relates to forgery and other offences concerning certificates of competency of ships' officers granted under that Act), shall apply to certificates of competency granted in Barbados and its dependencies.

OIL IN NAVIGABLE WATERS (SHIPS' EQUIPMENT) REGULATIONS, 1957 (S.I. No. 1424): operative July 1, 1958. All British ships registered in the United Kingdom, not being tankers, which have a gross tonnage of 80 tons or more, and which use their bunker fuel tanks for ballast water, are required to be fitted with an oily-water separator. The separator must comply with the provisions set out in the Schedule to the Order.

For penalties for contraventions, see section 6 of the Oil in Navigable Waters Act, 1955 ([1955] Crim.L.R. 448).

MERCHANT SHIPPING (SEAMEN'S PROVISIONS) ORDER, 1957 (S.I. No. 1373): operative October 7, 1957. The Order of 1945 (S.R. &

O. No. 1549) as amended (1946 S.R. & O. No. 891) is revoked, and new variations in and additions to the First Schedule to the Merchant Shipping Act, 1906, are made. This Schedule contains the scale of provisions to be furnished to such members of the crew of ships for which an agreement with the crew is required under the Merchant Shipping Acts.

For penalties for contraventions, see section 25 of the Merchant Shipping Act, 1906 (6 Edw. 7, c. 45).

Mines and Quarries

COAL-MINING (SUBSIDENCE) ACT, 1957 (5 & 6 Eliz. 2, c. 59): operative July 31, 1957. This Act provides for the execution of remedial works and the making of payments in respect of damage caused by subsidence resulting from the working and getting of coal or of coal and other minerals worked therewith; for the execution of works to prevent or reduce such damage; for the carrying out of remedial or preventive measures in connection with land drainage affected or likely to be affected by such damage; and for purposes connected with the aforesaid matters.

If the occupier of any premises refuses to afford the National Coal Board such facilities as they may require for the purposes of any provision of the Act (with certain exceptions) to enter upon, inspect and carry out works on those premises, the National Coal Board may obtain an order conferring upon them such powers, upon complaint made to a Magistrates' Court (or to the sheriff in Scotland) (s. 13 (9)).

If any person, for the purpose of obtaining for himself or for anyone else, any benefit under the Act, provides any information which he knows is false, or recklessly furnishes information which is false in a material particular or, with intent to deceive, withholds any material information, he shall be liable on summary conviction to a fine of up to £100 or to a maximum of three months' imprisonment or to both (s. 14).

The Act extends to Scotland, but not to Northern Ireland.

Probation

PROBATION RULES, 1957 (S.I. No. 1310): operative July 24, 1957, with effect from January 1, 1957. The Rules of 1949 (S.I. No. 1328) are amended in order to provide for increases of salary for whole-time probation officers, and for a decrease from thirty to twenty-nine years of age for entry into the higher scales of salary, pursuant to the provisions of the Police, Fire and Probation Officers Remuneration Act, 1956 (5 & 6 Eliz. 2, c. 1; [1957] Crim.L.R. 129). The new salary scales take effect from January 1, 1957.

Road Traffic

ROAD TRAFFIC ACT, 1956 (COMMENCEMENT NO. 5) ORDER, 1957 (S.I. No. 1389): operative July 31, 1957. Section 48 of the Road Traffic Act, 1956 (4 & 5 Eliz. 2, c. 67; [1956] Crim.L.R. 758–766) comes into operation on September 1, 1957. This section provides that driving licences, other than provisional ones, granted after the coming into operation of the section, are to remain in force for three years and to cost fifteen shillings; but for the next two years certain groups of applicants may get yearly licences, in order to spread the work of the licensing authorities.

MOTOR VEHICLES (DRIVING LICENCES) (GROUPING OF APPLICATIONS) REGULATIONS, 1957 (S.I. No. 1390): operative September 1, 1957. Applications for three-year driving licences, after the coming into operation of section 48 of the Road Traffic Act, 1956 (see above), are divided into three groups alphabetically, so as to spread the work of the issuing authorities.

MOTOR VEHICLES (DRIVING LICENCES) (AMENDMENT) (NO. 2) REGULATIONS, 1957 (S.I. No. 1391): operative September 1, 1957. The principal Regulations of 1950 (S.I. 1950, No. 333, as amended by S.I. 1950, No. 2108) are further amended so as to provide that (1) whatever fee is payable on the grant of a licence shall be paid before the applicant receives the licence. (2) The power of the motoring organisations to conduct driving tests for persons resident outside Great Britain is to be exercisable only if the person requiring to be tested applies for a test within one month of his last arrival in Great Britain. (3) The fee payable for the issue of a lost or defaced licence shall be increased from one shilling to two shillings and sixpence.

ROAD TRANSPORT LIGHTING ACT, 1957 (5 & 6 Eliz. 2, c. 51): operative August 31, 1957. Various enactments relating to the lighting of vehicles on roads are consolidated, the consolidated provisions being taken from eight statutes, the earliest of which is the Road Transport Lighting Act, 1927 (17 & 18 Geo. 5, c. 37), and the latest being the Road Traffic Act, 1956 (4 & 5 Eliz. 2, c. 67). The Minister of Transport is given further power to make regulations or orders dealing with the matters dealt with in this Act. Penalties for contraventions are laid down in section 12. The general penalty for contravening any of the provisions of the Act is, upon summary conviction, a fine not exceeding £5 for a first offence and not exceeding £20 for subsequent offences (s. 12 (1)). It is also made an offence for any person to sell or offer for sale any appliance adapted as a reflector to be carried on a vehicle which does not comply with the provisions of the Act. In this case the penalty on summary conviction is a fine not exceeding £5 for the first offence and not exceeding £10 for any subsequent offence.

The Act extends to Scotland, with the necessary adaptation provided for by section 18, but not to Northern Ireland.

Scotland

CRIMINAL JUSTICE (SCOTLAND) ACT, 1949 (COMMENCEMENT No. 3) ORDER, 1957 (S.I. No. 1360): operative October 1, 1957. The following provisions of the Act (12, 13 & 14 Geo. 6, c. 94) are brought into operation on October 1, 1957: section 63 (establishment of State Mental Hospitals); section 75 (2) (expenses in connection with State Mental Hospitals); section 79, in part (repealing part of the Criminal Lunatics (Scotland) Act, 1935, consequential on section 63).

Theatre and Cinematograph

CINEMATOGRAPH FILMS (COLLECTION OF LEVY) REGULATIONS, 1957 (S.I. No. 1341); (DISTRIBUTION OF LEVY) REGULATIONS, 1957 (S.I. No. 1342): both operative October 20, 1957. Provision is made for the imposition of a levy on exhibitors of cinematograph films, and the distribution of the proceeds of the levy to makers of certain British films, under the Cinematograph Films Act, 1957 (5 & 6 Eliz. 2, c. 21; [1957] Crim.L.R. 418).

For penalties for contraventions, see section 4 of the Cinematograph Films Act, 1957.

Trade and Industry

BAKING INDUSTRY EXEMPTION (No. 1) ORDER, 1957 (S.I. No. 1338): operative January 1, 1958. Restrictions on night work in the baking industry, which were imposed by the Baking Industry (Hours of Work) Act, 1954 (2 & 3 Eliz. 2, c. 57; [1954] Crim.L.R. 802), are no longer to apply in relation to bakery workers covered by the national working agreement dated February 8, 1953, full details of which are set out in Article 2 of the Order.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

36. *Interrogation of witnesses*

We frequently act for defendants in connection with summonses for motoring offences and have recently been engaged in an argument with the solicitor prosecuting in one of these cases with regard to the propriety of our interviewing and obtaining written statements from persons who are to be called as witnesses by the police. The prosecution's view is that if a person is to be called as a prosecution witness, and the defence is aware of this, it is improper for the defending solicitors to interview the witness since this might give rise to a suspicion that the witness had been interfered with.

Our view is that there is no property in a witness and since in our view the prosecution's duty is to present the case fairly to the magistrates, whereas the duty of the defending solicitor is to endeavour to obtain an acquittal of his client by all legitimate means, the defence would be at a disadvantage if the defendant did not know until he was in court the nature of the prosecution evidence. Our view that there is nothing improper in seeing a witness who we know is to be called on behalf of the prosecution is fortified by taking an extreme case where, for instance, a wily defendant might obtain statements from all possible witnesses of his offence, inform the police that he had done so and the prosecution would be virtually strangled at birth, since it is unlikely that a prosecution would be commenced without some statements from witnesses.

The prosecuting solicitors with whom we discussed this matter were of opinion that the rule worked against the prosecution equally well as against the defence and would not accept the reduction to absurdity mentioned in the preceding paragraph.

[W. B. H.]

ANSWER

There is nothing whatsoever to prevent either party to any proceedings, whether civil or criminal, from interviewing any persons who might in any way be able to assist in those proceedings. There is no authority on this point because, so far as I am aware, the right to such interviews has never been questioned. Indeed it is clearly for the party who objects to this procedure to produce authority to show that it is in any way irregular. The example put by the questioner, of taking the proposition to its extreme, is an admirable one, and it applies, of course, both to civil and criminal proceedings. [F. M. D.]

Letter to the Editor

Causation in Homicide

Sir,

R. v. *Holland* (*1841*)

In his interesting article on "Causation in Homicide" Dr. Glanville Williams is wrong in surmising ([1957] Crim.L.R. 515) that the accused Holland waylaid and assaulted the deceased in the course of felonious robbery.

Some details of the case and its background may be of interest:

On Saturday, October 3, 1840, the timber merchants and master sawyers of Ashton-under-Lyne, Lancashire, gave their journeymen hand-sawyers notice of an intention to reduce their wages to those paid at Manchester. The following Monday some thirty sawyers, including Joseph Holland, "turned out"; they were all members of the Northern Union of Sawyers. The employers took on fresh hands, including Thomas Garland of Manchester; these "knobsticks," as they were then known, were non-unionists. During that October, the strikers paraded the streets of Ashton, and picketed the yards of the master sawyers. On the night of October 20, 1840, an attempt was made to set fire to the house of a master sawyer.

Between 4.30 and 5 p.m. on October 31, 1840, five of the "knobstick" journeymen sawyers, including Garland, were walking home from Ashton to Manchester. They had been warned that they might be attacked by strikers. About half a mile from Ashton, twelve to fifteen men sprang from behind a hedge, and with pieces of iron and clubs, savagely attacked the five men, one of whom ran away immediately; another escaped after being beaten; Garland and the other two were badly injured. Holland was one of the three or four men who set on Garland, and was afterwards said to have aimed a blow at Garland's head and hit his hand. Garland suffered severe lacerations and contusions of the scalp, a compound fracture of the nose and a compound fracture of the first right finger, the bones of which were laid bare. The attackers ran away.

Garland was taken to the Manchester Infirmary, where the house surgeon, Furnival, strongly urged him to have his finger amputated; Garland refused. He was an out-patient until November 15, 1840, when he was taken into the Infirmary suffering from lock-jaw. Part of his finger had "sloughed off from mortification." The finger was amputated, but Garland died the next morning.

At an inquest held by Chapman, the Manchester Borough Coroner, a verdict of "Wilful Murder" was returned. At that time the validity of the Manchester Borough Charter was in dispute, and the County Coroner, Rutter, also held an inquest: a verdict of "Manslaughter" was then returned.

On March 11, 1841, Richard Green, an Inspector of the Manchester Police, after travelling over a thousand miles in England and Wales seeking Garland's murderers, arrested Holland on a Dublin quay, whilst among a crowd of sawyers.

Holland was tried for murder at the South Lancashire Spring Assizes, Liverpool, on April 7, 1841, before Maule J. The surgeon's evidence was that Garland had died from lock-jaw, which arose from the injuries he had received; amputation would undoubtedly have been safer and if the finger had been amputated when Furnival recommended it, Garland might probably have recovered. Furnival said that the lock-jaw was not certain from the injury to the finger. He added that lock-jaw was sometimes caused by mere abrasion and sometimes without a wound, in which latter case the patient almost always recovered, but when it was brought on by wounds, the witness only knew of one case where the patient recovered.

Wilkins, leading defence counsel, said he would take the opinion of the court whether, as the deceased had resisted the advice of the surgeon, the indictment for murder could be sustained. Counsel quoted a case from Roscoe, in which a smuggler, attempting to land a cargo, had been wounded, and, being attended by an unskilled country surgeon, died. It was contended for the prisoner that if proper treatment had been used, he would have recovered. This was held to be improper, *ex malo regimine* being a bad plea. Overend, his junior counsel, argued that the death of the deceased was his own act, as he had a reasonable chance of escape if he had adopted the advice tendered to him.

The judge overruled these objections. He said: "It certainly was not the law that, if a party died from not having followed the most cautious advice of the surgeon, the party who inflicted the wound was not to be responsible for it."

The judge, in summing up, said he could see nothing in the evidence which could reduce the case to one of manslaughter. Holland was found guilty of murder and sentenced to death. This sentence was, apparently, later respited.

At the same assizes, in connection with the same strike, eighteen other sawyers were bound over in recognisances on charges of conspiring to raise wages and assault, while two men, John Williams and John Hulme, were found not guilty of the murder of another sawyer at Ashton on December 11, 1840. Williams was, however, sentenced to eighteen months' hard labour for conspiracy.

Hulme, alias "Cast Metal Jack," was not a sawyer, but on his release he fled to America with financial help from the Sawyers' Union. Hulme returned to England about June, 1843, and was then arrested and charged with the murder of Garland. At the South Lancashire Summer Assizes, at Liverpool, August 25, 1843, he was found not guilty of murder, but guilty of manslaughter, and sentenced to be transported beyond the seas for the term of his natural life.

The main sources for this account are *The Manchester Guardian*, April 10, 1841, and *The Manchester and Salford Advertiser*, April 10, 1841. There is also a brief account in *The Times*, April 9, 1841.

Your faithfully,
ARTHUR G. ROSE.

Manchester.

Books and Periodicals

Reviews:

The Mind of the Murderer. By W. Lindesay Neustatter, M.D., B.SC., M.R.C.P. Physician in Psychological Medicine, the Royal Northern Hospital. London: Christopher Johnson. 1957. xi and 233 pp. (25s. net.)

In this important and interesting book the author, a psychiatrist with wide forensic experience, considers a selection of murderers from the standpoint of their mental conditions. These include schizophrenia (Bennet), hysteria (Christie, Alcott), mental deficiency (Straffen), paranoia (Ley), epilepsy (Elwell), sadism (Clarke, Heath), psychopathy (Giffard, Heath), hypoglycaemia (Lee Smith), hypnotic suggestion (Hardrup and Nielson), simulation of insanity (Haigh), and a number of other conditions such as melancholia and physical brain disease. The lay public, baffled by the complexity of psychiatric evidence in murder trials, will find this book an invaluable introduction to the subject, as the author's explanations in simple language of psychiatric terms and syndromes are masterly.

Of particular interest to criminal lawyers will be the author's references to the Homicide Act, both in the introduction, and at the end of most chapters where he discusses the possible operation of the statute in the circumstances of the cases he has been considering. For ease of reference the Act is printed at the end of the book. Dr. Neustatter has done criminal lawyers a service by pointing out that murders committed in a state of post-epileptic automatism are exceedingly rare, and it is to be hoped that this condition will now cease to occupy such a prominent position in the legal literature on the subject. Although the incidence of epilepsy amongst murderers is about 32 times that in the general population, careful history taking, as the author points out, has shown that the murders were not committed following fits. Dr. Neustatter concludes that there is a close relationship between the commission of murder and epilepsy, but leaves the reader in mid air in his haste to point out that the great majority of sufferers from epilepsy are perfectly good law-abiding citizens. The reader would have welcomed at this point a reference to the fact that inadequately treated epileptics are notoriously prone to develop serious anti-social behaviour disorders, rendering normal life in society difficult or impossible. About 10 per cent. of epileptics are in this class according to the recent (1956) report of Central Health Services Council's Subcommittee on Medical Care of Epileptics (para. 13 (3)). The author poses the question whether execution is not more humane than life imprisonment for a psychopathic individual with enormous sexual drive such as Heath. A curious omission at this point is the question of voluntary castration which has met with remarkable success in these cases in Scandinavian countries. In Denmark voluntary castrates who have been returned to society and followed up yearly have shown a relapse rate into the homologous sexual crime of only 1 per cent.

In conclusion, one is forced to complain that more care should have been taken over revising the text of this important and valuable book. Many sentences require repeated reading, and in some cases the meaning still remains obscure. One's suspicion is immediately aroused by the appearance on the first page of "Lord Justice Denham"—as he never was.

J. D. J. HAVARD.

College Harry. By David Elias. London: Longmans, Green & Co., Ltd. 1957. 254 pp. (16s. net.)

This highly entertaining book falls into two quite distinct parts. The first, which is made up of various incidents in the life of this versatile crook, is narrated by Mr. Elias with verve and vigour: the resultant picture leaves one wondering whether there is not, perhaps, some truth in the tradition of comedy and crime upon which the reputation of the Ealing Studios was built. That these things happened, and that the colourful personalities who assisted College Harry in making them happen exist, are beyond doubt, for College Harry and his friends of the "underworld" have spent many years in gaol as a result of them.

The remainder of the book consists of a series of "Digressions" in which College Harry shows the development of crime throughout the last twenty years or more. Crime, like most things, seems to have fashions (for example, plate glass and motor-cars brought the smash-and-grab raid into vogue), and College Harry's digressions on "fashions in crime" provide fascinating and very instructive reading. Whether any law-abiding citizen can benefit from his instruction is doubtful: the authors make every effort to show that any financial benefit reaped is more than offset by the long years in gaol—that, in fact, crime does not pay—but one feels that if every criminal could find such an able chronicler as College Harry has found in David Elias, crime would become very profitable.

A. L. N.

Stone's Justices Manual. Eighty-ninth edition. Edited by James Whiteside, O.B.E., and J. P. Wilson. Two volumes. London: Butterworth & Co. (Publishers), Ltd.; Shaw & Sons, Ltd. 1957. cccxxxvi and 3074 and (index) 227 pp. (Thin edition, £4 15s. net; Thick edition, £4 10s. net.)

The past year has brought a large number of important statutes affecting Magistrates' Courts, and the new edition of *Stone's Justices Manual* has to deal wholly or in part with the Sexual Offences Act, 1956, the Family Allowances and National Insurance Act, 1956, the Small Lotteries and Gaming Act, 1956, the Magistrates' Courts (Appeals and Binding Over Orders) Act, 1956, the Agriculture (Safety Health and Welfare Provisions) Act, 1956, the Restrictive Trade Practices Act, 1956, the Clean Air Act, 1956, the Therapeutic Substances Act, 1956, and the Occasional Licences and Young Persons Act, 1956, in addition to the really major Act affecting Magistrates' Courts—the Road Traffic Act, 1956.

With this formidable mass of legislation and case law to be incorporated into the two volumes, now extending to over 3,000 pages, it was perhaps too much to hope that the editors could this year get down to the serious task of completely re-writing large sections of the work; but there are parts which are suffering from an accumulation of additions and amendments over a considerable time, and it is clear that a complete re-casting of these sections is something which will have to be tackled in the near future if the high standard of the work is to be maintained. A very small section (that on neglect to maintain in matrimonial causes) which has been re-written this year illustrates the improvement which can be made. If the editors will only set themselves a number of similar sections to re-cast each year their " Stone's " will maintain its present high standing.

Meanwhile the editors must be congratulated for incorporating into the text or the notes the many new decisions reported during the past year; and in this respect the preface, which gives a comprehensive review of the principal changes in case and statute law during 1956, is particularly clear and will be found of considerable help to practitioners, clerks, magistrates and all others who rely so much on the " Yearly Justices' Practice."

F. M. D.

Books Received:

The Urge to Punish. By Henry Weihofen. London: Victor Gollancz, Ltd. 1957. 208 and (index) 5 pp. (15s. net.)

My Son's Execution. By William George Bentley. London: W. H. Allen. 1957. 175 pp. (12s. 6d. net.)

Readers' Digest:

Animals: Diseases of animals: 65 *Police Review* 570.

Lotteries: Lotteries and Gaming Law: 65 *Police Review* 600, 616, 632.

THE
CRIMINAL LAW
REVIEW

Editors
JOHN BURKE and PETER ALLSOP, M.A.
Barristers-at-Law

Editorial

Practice at Quarter Sessions and Assizes

This month we are publishing the first of a series of extracts from a handbook of practice and procedure at Quarter Sessions and Assizes. The handbook has been prepared by C. E. S. Horsford, Barrister-at-Law, of the County of London Sessions. The first of these extracts, at p. 741, below, is on various aspects of the law of evidence.

Criminal law reform

At a recent conference of the Society of Public Teachers of Law the Lord Chancellor gave an address on Law Reform and concluding said that he was willing to accept any suggestions for subjects which could be considered for reform. In the subsequent discussion amongst members of the Society it was pointed out that no subject of Criminal Law had been referred to the Law Reform Committee nor to its predecessor the Law Revision Committee. It was suggested that the law of larceny and the law of arrest should be considered by a special law reform committee. The Society subsequently formed a sub-committee to prepare a memorandum on the reform of the criminal law, with special reference, in the first instance, to the law of theft.

The Howard League for Penal Reform

The Annual Report of the Howard League for Penal Reform reveals that the League has made recommendations to the Tucker

Committee on preliminary proceedings before magistrates suggesting that there should be no press report of committal proceedings except where no case has been found, or where the accused person requested publicity. The League suggests, however, that where a person has been committed for trial a statement to this effect should be made public, without revealing the name of the accused person.

Another subject considered by the League in their report is the introduction of a parole system for prisoners serving sentences of three or more years' imprisonment. The League has also tried to interest industrialists in placing contracts with the Prison Commissioners so that more work, of a wider variety, would be available to prisoners.

The League intends to ask the Government for an inquiry into appeals procedure in criminal cases. Among points raised will be the right to appeal to the House of Lords, composition of the Court of Criminal Appeal, procedure at that court, and questions to be decided by it.

Candid camera

When the National Physical Laboratory at Teddington found that mercury was being stolen, they called on their scientific resources to catch the thief. A camera device was constructed which operated to take a photograph of anyone at the cupboard when the key was turned in the lock. When the film was developed, besides photographs of persons authorised to go to the cupboard, there was a photograph of one of the electricians at the laboratory. At Feltham Magistrates' Court the man, Joseph Bates, was fined £25 on being found guilty of stealing 25 lb. of mercury.

Open prison

Leyhill Prison, Gloucestershire, is still one of the most progressive prisons in Britain. Recently, specially invited visitors wandered round an exhibition of work and handicrafts by long-term " star class " prisoners. The idea behind the exhibition was, according to Mr. P. C. Jones, the Governor, to give people who are interested some idea of the vocational and industrial training given in the prison. " We also wanted to prove to industrialists and trade union officials that the men who have been trained can do a good job and are worth employing."

Mr. Jones said that the prisoners work a 44-hour week. Some already have jobs waiting for them when they leave, but it was not always easy to find jobs for teachers, lawyers or accountants, who could not go back to their former employment. The open-prison system was, he continued, no longer experimental: it was a success.

More than 98 per cent. of those passing through Leyhill never got into trouble again.

"A bad case"

This was Mr. Justice Slade's comment at the Old Bailey when sentencing John Sidney Keetch for dangerous driving. The judge said that he was satisfied that Keetch had driven at a grossly excessive speed and that having killed a man and his wife as they were crossing the road he was guilty of "about as heartless behaviour as one could possibly imagine" in driving on leaving the couple lying in the road. Keetch then "lied over and over again in an endeavour to escape responsibility for [his] callous and heartless conduct." The sentence was of six months' imprisonment, disqualification from driving for three years and an order to pay £50 costs.

Hearsay evidence

Magistrates at Kingston, Surrey, ruled on September 13 that a transcript of a tape recording of conversations alleged to have taken place between a man named Harvard and two policemen could not be admitted in evidence against two policemen who were accused of obtaining money by threatening prosecution of people dealing in pornographic photographs. The transcript was regarded as "hearsay evidence."

Motor-scooter braking systems

The Appeals Committee of the Surrey Quarter Sessions has quashed a conviction against a Vespa motor-scooter owner for using a motor-vehicle with an inefficient braking system on the grounds that the method used by the police for testing the brakes bore no relation to the braking when the machine was ridden. The machine was tested by applying the brake when the machine was still and pushing the machine forward. The Chief Engineer of the Automobile Association said that the machine had a specially designed brake lining with a frictionary effect which improves with the generation of heat in travel.

Asking for costs, counsel for the appellant said that the appeal had been brought on behalf of Vespa owners throughout the country. The court decided to make no order as to costs.

Surgery and crime

Dr. D. A. Ogden, Medical Officer to Portland Borstal Institution and Verne Prison, addressing the Royal Society of Health, described a new form of research which has resulted in the use of remedial surgery on Borstal delinquents. It was found that a considerable number of youths suffered from squints, crooked noses, internal nasal obstructions, lumps, ugly scars and other physical disabilities. A survey showed that youths receiving treatment were succeeding after release at a rate of 33 per cent. better than youths who had not received treatment. Of youths who had had deformities of the nose corrected only one in eight had been reconvicted after two years. Dr. Ogden attributed these striking results to the fact that " in one stroke a source of chronic physical discomfort and emotional embarrassment has been removed."

Judicial appointment

John Mervyn Guthrie Griffith Jones, Esq., M.C., has been appointed Recorder of the Borough of Grantham.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

The Onus of Proof Again

It is characteristic of the development of English criminal law that the first case under the Homicide Act to reach the Court of Criminal Appeal should have raised, not any novel question of construction, but one of the most familiar of the problems that have from time to time puzzled our courts. In *R.* v. *Dunbar*[1] the accused, it will be remembered, was charged with capital murder under section 5 (1) (*a*) of the Act and set up the defence of diminished responsibility which is provided by section 2 (1). It was not disputed that he killed in the course or furtherance of theft and no complaint was made of the judge's direction on what constitutes diminished responsibility. The appeal turned solely on the question what evidence is required to establish the statutory defence which was set up; the Court of Criminal Appeal held that the judge failed to make it clear to the jury that the onus of proof placed on the accused by the section is less heavy than the onus which rests throughout a criminal trial on the prosecution[2] and it accordingly substituted a verdict of manslaughter for the conviction of capital murder. The case provides, therefore, a useful pretext for looking again at the questions relating to the onus of proof which Dr. Glanville Williams discussed in an article in this *Review* some two years ago.[3]

The effect of precedent

Before those questions are examined, however, there are two other features of the case which are worthy of attention. First, the court held itself bound by the decision in *R.* v. *Carr-Briant*[4] that, where the onus of proof rests on the defence, it is more easily discharged than the onus which ordinarily rests upon the prosecution. This is not, of course, the first occasion upon which, since *R.* v. *Treanor*[5] was disapproved in *R.* v. *Taylor,*[6] the court has referred to previous decisions as being binding: in *R.* v. *Newland,*[7] for example, the Lord Chief Justice gave it as the considered opinion of the court that the decision in *R.* v. *Manley*[8] ought not to be followed, but said expressly that the court had no power to disapprove it; more recently,[9] the court has held itself bound to follow that extremely unsatisfactory decision of the Court for Crown Cases Reserved, *R.* v. *Riley.*[10] The unusual feature of the present case is that, when the appeal was first argued, it was put back for hearing before five judges,[11] but when the hearing was resumed, the appeal was heard and decided by the three judges before whom it had come in the first place. The decision to adjourn the appeal to be re-argued before five judges can scarcely have been due to any wish to consider the question whether the case could be distinguished from *R.* v. *Carr-Briant*: that question could, presumably, have been considered equally well by the three judges who first heard the case; and when the hearing of the appeal was resumed before them the Attorney-General, while conceding that *R.* v. *Carr-Briant* was both rightly decided and relevant, in fact sought to uphold the judge's direction. The only rational explanation of the course of events would seem, therefore, to be that at one stage the court had contemplated disapproving the decision in *R.* v. *Carr-Briant,* but abandoned the idea on learning that the Crown was not prepared to argue that it was wrongly decided.

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[1] [1957] 3 W.L.R. 330.

[2] The judge's direction contained two express references to the onus of proof placed on the defence by the section, the effect of which was comprised in the concluding words of the second of them: "Something has been said about the balance of probabilities and about the burden of proof and about doubt, and so on. I prefer to leave you with the simple words of the Act of Parliament, '. . . it shall be for the defence to prove'; and if it does not the defence goes": [1957] 3 W.L.R. 330, 334.

[3] [1955] Crim.L.R. 464.

[4] [1943] K.B. 607.

[5] (1939) 27 Cr.App.R. 35.

[6] [1950] 2 K.B. 368.

Application of " the proviso "

Second, the court indicated in the clearest possible terms that it will not apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907,[12] in any case where the appellant has been convicted of capital murder. In the course of delivering the judgment of the court the Lord Chief Justice said that " in a matter which makes a difference between a capital sentence and a sentence only of imprisonment we feel it would be unsatisfactory for the court to consider applying the proviso " and it will have been noticed that, two weeks after the decision in *R.* v. *Dunbar,* the court allowed an appeal against a conviction for capital murder on the grounds that the judge had misdirected the jury about the law of provocation in a case in which it was said that, if he had decided not to leave the question to the jury at all, the court would probably not have interfered.[13] This aspect of the decision in *Dunbar's* case is worthy of attention for two reasons: there is nothing in the proviso itself to suggest that it is inapplicable to capital cases; and the House of Lords has in terms held that it is applicable to capital cases in exactly the same way as it applies to all other cases.[14]

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[7] [1954] 1 Q.B. 158, 167–168.

[8] [1933] 1 K.B. 529.

[9] *R.* v. *Kindon* [1957] Crim.L.R. 607.

[10] (1853) Dears. 149.

[11] *The Times,* June 25, 1957.

[12] Which provides that " the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Proof beyond reasonable doubt

It is in one way surprising that it should ever have become necessary for the court to consider the question of the proviso. When clause 2 of the Homicide Bill was being considered in Parliament, the wording of subsection (2) was defended by the Solicitor-General on the basis that " it is our intention to impose on the defence here nothing more than a burden to prove ' that the preponderance of probability is,' certainly not a burden ' to establish beyond reasonable doubt.' We have chosen this word ' prove ' advisedly, because in England—and this is the part of the Bill which relates only to England—there is . . . the plainest possible authority that the word ' prove ' in relation to a defence onus means that the defence has to establish no more than the balance, the preponderance of probability." [15] The " plainest possible authority " was, of course, *R.* v. *Carr-Briant* and it was on the strength of that decision that the Government resisted an amendment moved by Sir Frank Soskice which was intended to make it clear beyond doubt that the onus placed on the defence by the section was lighter than the onus resting upon the prosecution.[16] It is in these circumstances strange that within six months of that debate, and at the very first trial in which the defence of diminished responsibility was put forward, the Crown should have sought to argue that the onus placed upon the defence by the section was the burden of proving beyond reasonable doubt. That that course was not adopted with malice aforethought, however, is, it is suggested, established clearly enough by the fact that when the adjourned hearing of the appeal took place the Attorney-General intervened on behalf of the Crown to support the construction of the section put forward by the defence.

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[13] *R.* v. *McPherson* [1957] Crim.L.R. 618.

[14] *Woolmington* v. *D. P. P.* [1935] A.C. 462. The proviso was in fact applied by the Court of Criminal Appeal in *Woolmington's* case.

[15] H.C. Debates, Vol. 561, Cols. 456–457.

[16] If the amendment, which was withdrawn, had been made the section would have required the defence to " satisfy the jury " (instead of requiring the defence to " prove "). It is doubtful whether the amendment would have achieved its object of making the section any clearer: see *R.* v. *Carr-Briant* [1943] K.B. 607.

It may be thought, however, that there was in any event clear enough authority binding on the court to make it unnecessary for a commentator to look at Hansard to discover what, as a matter of historical fact, the Government intended to achieve. In the first place, Parliament is presumed to legislate with knowledge of the prevailing law [17] and when the Homicide Act was passed there was the " plainest possible authority " of *R.* v. *Carr-Briant* that " where, either by statute or by common law, some matter is presumed against an accused person ' unless the contrary is proved,' the jury should be directed that the burden of proof on the accused is less than that required at the hands of the prosecution in proving the case beyond any reasonable doubt, and that this burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called on to establish." [18] That decision is quite unequivocal; and a provision that " it shall be for the defence to prove " is plainly indistinguishable in principle and construction from a provision that a matter is presumed against the accused unless the contrary is proved. In the second place, section 2 of the Homicide Act is on its face an importation from the law of Scotland, according to which, in the words concluding the charge to the jury in *H.M. Advocate* v. *Braithwaite,* " if you think the balance of probability to be in favour of that defence, you must sustain it." [19] In the third place, the defence of diminished responsibility is analogous to, and (as was pointed out in a recent article in this Review [20]) to a certain extent overlaps, the defence of insanity under the McNaghten Rules and it would clearly be highly anomalous if one defence should be harder to prove than the other; while there seems to have been some doubt about the burden of proving insanity at any rate as late as 1908, when Bigham J. is reported to have directed a jury that the defence must prove insanity beyond reasonable doubt,[21] it is generally accepted today that " in fact there is no doubt that the burden of proof for the defence is not so onerous." [22]

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[17] *Young & Co.* v. *Mayor, etc., of Leamington* (1883) 8 App.Cas. 517, 526, *per* Lord Blackburn.

[18] [1943] K.B. 607, headnote. The reference to matters presumed by common law is to the McNaghten Rules; *Carr-Briant* was a case under the Prevention of Corruption Acts and the reference is therefore *obiter*.

[19] 1945 S.C.(J.) 55.

[20] [1957] Crim.L.R. 521.

[21] *R.* v. *Jefferson, The Times,* July 20, 1908, reversed on other grounds: 1 Cr.App.R. 95.

[22] *Sodeman* v. *R.* [1936] 2 All E.R. 1138, 1140, *per* Viscount Hailsham. See also *R.* v. *Carr-Briant* [1943] K.B. 607, 609, where Humphreys J. said " there can, however, be no doubt that the onus on the accused in a defence

In these circumstances, therefore, it would seem plain that the defence provided by section 2 of the Homicide Act is established if the accused can show that it was more probable than not that at the time of the offence he was suffering from diminished responsibility and on that view the only question for the Court of Criminal Appeal in *Dunbar's* case was whether the judge made that clear to the jury. The Lord Chief Justice was, however, reported by some newspapers as having made during the argument an interjection reminiscent of the remark by Hilbery J. in the course of the argument in *R.* v. *Murtagh* that "I personally have never seen the difference between the onus of proof in a civil and criminal case. If a thing is proved, it is proved, but I am not entitled to that view."[23] It will be remembered, too, that in the case of *R.* v. *Hepworth* Lord Goddard himself said: "I confess that I have had some difficulty in understanding how there are or there can be two standards."[24] There is, it will be suggested later in this article, a valid sense in which it can be said that there is only one standard of proof; but it is not, and never has been, the case that, irrespective of the surrounding circumstances, any given number of facts must always be sufficient to prove a given allegation. To reject this view as a proposition of law it is necessary to refer only to the elementary principle that in proceedings for divorce an admission by a respondent wife is sufficient to prove that she committed adultery with the co-respondent, but quite insufficient to prove that the co-respondent committed adultery with her[25]; that principle depends, however, on a rule about the admissibility of confessions in evidence rather than on any rule about the burden of proof and in this context it might be more fruitful to take an example from everyday life to illustrate the value of the well-known dictum of Lord Stowell that "the only general rule that can be laid down upon the subject is, that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion."[26] Thus a man

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of insanity is far different from that normally resting on the prosecution," a dictum apparently overlooked by the Editor of the 9th edition of Phipson on *Evidence,* who quoted with approval and without explanation the criticism made of *Sodeman's* case in *The People* v. *Fennel* [1940] I.R. 445, which, as Humphreys J. pointed out in *Carr-Briant's* case, "is so inaccurate as to be misleading."

[23] (1955) 39 Cr.App.R. 72. The interjection was cited at [1955] Crim.L.R. 469.

[24] [1955] 2 Q.B. 600, 603.

[25] *Rutherford* v. *Richardson* [1923] A.C. 1, 6. A famous instance of the application of the principle occurred in *Crawford* v. *Crawford and Dilke* (*Queen's Proctor intervening*) (1886) 11 P.D. 150, which illustrates that, whatever its legal efficacy, the distinction recognised by the principle is too subtle for the layman.

[26] *Loveden* v. *Loveden* (1810) 2 Hag.Con. 1, 3.

wishing to travel to Waterloo on a suburban line might well accept the word of his wife about the time of the next train if he were proposing merely to spend an afternoon in town; he would probably take the precaution of consulting the timetable if he intended to go there in order to catch a train leaving on the main line; and he might go even further and verify the timetable by telephoning the station if it was his intention to go on to the air terminal to make a long-distance journey by aircraft. This is not so much a matter of logic as of the merest common sense, but it has a certain amount of support as a principle of law, in particular in the dictum of Holroyd J. that " the greater the crime the stronger is the proof required for the purpose of conviction," [27] and, as Dr. Glanville Williams pointed out in his article, the idea was revived by Denning L.J. in *Bater* v. *Bater*,[28] at least as a means of distinguishing between the onus in civil and criminal cases.

While the principle is, as has been said, the merest common sense, it may nevertheless lead to difficulties of law if the same fact is relevant in two different contexts. This is precisely what happened in the case of *Hornal* v. *Neuberger Products, Ltd.*,[29] which came before the Court of Appeal towards the end of last year. That case was an action for breach of warranty or, alternatively, fraudulent misrepresentation and, for the purposes of the appeal, the only substantial issue of fact was whether the material representation had in fact been made by the defendant. The county court judge held that he was satisfied on the balance of probabilities, but not beyond reasonable doubt, that it had been made and, not very surprisingly, provoked Denning L.J. to comment that " it would bring the law into contempt if a judge were to say that on the issue of warranty he finds the statement was made, and that on the issue of fraud he finds it was not made." [30] The comment may well be apt, but it invites two observations: in the first place, the judge's finding that the statement was not proved beyond reasonable doubt was not a finding that it had not been made—any more than the rejection of the defence put forward by an accused person necessarily involves his conviction; in the second place, there would almost certainly have been no suggestion of the law being brought into contempt if the alternative claims of the plaintiff had been tried in different proceedings with different results. It is perhaps worth pointing out in this connection that a year or two ago a Divorce Commissioner rejected a submission that the respondent husband had attempted to murder his wife, although at the time the petition was heard the husband was serving a term of ten years' imprisonment for that very offence.[31] One may, therefore, reasonably prefer the comment, however ironically it may have been intended, made by Morris L.J. in *Hornal's* case that " the precision of this revealed judicial heart-searching is impeccable from the point of view of its logical nicety " [32]; but the particular difficulty which faced the county court judge and the Court of Appeal in that case is not one that is likely to arise in criminal proceedings and for the purposes of this article it may therefore be ignored.

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[27] *R.* v. *Hobson* (1823) 1 Lew.C.C. 261.

[28] [1951] P. 35, 37, where, without giving any references, the Lord Justice said that " as Best C.J. and many other great judges have said ' in proportion as the crime is enormous, so ought the proof to be clear.' "

[29] [1957] 1 Q.B. 247.

[30] [1957] 1 Q.B. 247, 258.

The civil and criminal standards

The decision illustrated, however, and all three members of the Court of Appeal commented on, the fact that the quantum of proof required in a criminal case is greater than that required in civil proceedings. Many explanations for this difference have been put forward: the fact that, until little more than a hundred years ago, so many convictions attracted the death penalty; the fact that until the end of the nineteenth century the accused could not give evidence on his own behalf; the fact that it was not until 1907 that a truly appellate procedure was available in cases tried on indictment; and the fact that the accused is presumed to be innocent.[33] The true reason, it is suggested, is once more that the difference is due to the commonsense approach to the problem and it is in this sense, paradoxical though it may appear, that it may truly be said that there is but one standard of proof in all proceedings. That standard was expressed by Denning L.J. in *Bater* v. *Bater* [34] as proof beyond reasonable doubt, the important question in each case being what doubt would in the particular circumstances be reasonable: in other words, the standard is uniform but the amount of evidence required to meet it varies.[35] Dr. Glanville Williams has argued that the reference in this context to proof beyond reasonable doubt can only result in confusion, particularly when it is applied to an issue properly susceptible of being decided on the merest balance of probability.[36] It is suggested, therefore, that the principle could be more aptly expressed in the phrase that an issue is always decided on the balance of probabilities, but the margin of error will vary according to its gravity. If this approach is adopted no great difficulty arises in distinguishing between civil and criminal cases, between one civil case and another or between one criminal case and another, particularly, to adopt the words of Morris L.J. in *Hornal's* case, " if the words that are used to define that approach are the servants but not the masters of meaning." [37]

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[31] *R.* v. *Whybrow* (1951) 35 Cr.App.R. 141, a particularly striking example, because the conviction was affirmed by the Court of Criminal Appeal only on the application of the proviso to s. 4 (1) of the Criminal Appeal Act. The divorce proceedings were not reported.

[32] [1957] 1 Q.B. 247, 265.

[33] See, for example, Best on *Evidence* (12th ed.), para. 95; Taylor on *Evidence* (12th ed.), p. 106; and Kenny's *Outlines of the Criminal Law* (16th ed.), p. 416, misquoting the famous passage from Brougham's *Defence of Queen Caroline*, and *cf.* [1957] 1 Q.B. 247, 266.

[34] [1951] P. 35, in which he referred also to " a degree of probability which is commensurate with the occasion " and " a degree of probability which is proportionate to the subject-matter ": *ibid.* 36, 37.

[35] In his article Dr. Glanville Williams suggested that, in criminal cases, it is the quantum which is uniform. That contention seems to be disposed of by the

Dunbar's case did not, of course, raise any of the questions about the onus of proof resting on the prosecution which inspired the article by Dr. Glanville Williams in this *Review*. This seems, nevertheless, a suitable occasion to suggest that some modification of his comments is required in the light of the published judgments in the three cases which he examined most closely, namely, *R.* v. *Blackburn*,[38] *R.* v. *Murtagh* [39] and *R.* v. *Hepworth*.[40] In each of those cases it was common ground that the onus of proof rests on the prosecution and that the prosecution has to establish something more than a mere preponderance of probabilities. In each case the question was whether the judge had made those two points clear to the jury. In *Blackburn's* case the Court of Criminal Appeal held that he had; in *Murtagh's* case the court held that he had failed to make it clear that the onus always rests on the prosecution; and in *Hepworth's* case it held that he had failed to make either point adequately clear. On each occasion, however, the court emphasised that the judge's direction must be considered as a whole and, beyond repeating (what was already known to every practitioner and has, moreover, been

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following passage (about the onus of proof in criminal cases) from the dissenting judgment of Lord Oaksey in *Preston-Jones* v. *Preston-Jones* [1951] A.C. 391, 409: " That onus is generally described as being a duty to prove guilt beyond reasonable doubt but what is reasonable doubt is always difficult to decide and varies in practice according to the nature of the case and the punishment which may be awarded." In some cases there have been dicta which seem to suggest that the proof beyond reasonable doubt applies to the proof of guilt over the case as a whole rather than to any individual issue in it; this approach must, it is suggested, be wrong: a jury which is merely satisfied on the balance of probabilities about each individual issue in the case cannot possibly be satisfied of the guilt of the accused " beyond a reasonable doubt."

[36] [1955] Crim.L.R. 474.

[37] [1957] 1 Q.B. 247, 266.

[38] (1955) 39 Cr.App.R. 84, note.

[39] (1955) 39 Cr.App.R. 72.

[40] [1955] 2 Q.B. 600.

expressly held by the House of Lords)[41] that no particular form of words is either necessary or sufficient to explain these two points, the three cases do not appear to decide any question of law at all. It does not, therefore, seem to be appropriate to speak (as Dr. Glanville Williams spoke) of the decision in *Murtagh* having impliedly overruled the decision in *Blackburn*. Indeed it is difficult to believe that, if it had, no steps would have been taken either to pardon Blackburn or to refer his case back to the court under section 19 of the Criminal Appeal Act.

It does not, of course, follow that *Blackburn's* case must be regarded as having been rightly decided, for it is at least arguable that the court was wrong in holding that the judge adequately explained to the jury the two points which it was his manifest duty to explain to them.[42] What does follow is that, whether the court was right or wrong, it was not deciding any question of law, but applying—or misapplying—an established principle of law to ascertained facts.[43] It is suggested, with some hesitation, that the issues discussed by Dr. Glanville Williams may have been confused by the fact that the reference to proof beyond reasonable doubt has been commonly understood not only as implying proof of a higher standard than that required in civil cases but also as dealing with the situation which arises when the jury, although rejecting the accused's explanation, are still not convinced by the case for the prosecution. There is no doubt, and there never has been any doubt, that in that situation the jury must acquit and it is quite impossible to construe the judgment in *Blackburn's* case as holding that they would be justified in convicting.

It is now possible to turn to the question what form the judge's direction to the jury should take. It is not too much to say that since the decision in *R.* v. *Summers*[44] the courts have been floundering in what must necessarily be a vain search for a satisfactory formula, possibly because they have been treating as a question of law what is in fact a question of language. Recently juries have been told that they must be satisfied beyond reasonable doubt, that they must feel sure, that they must be fully satisfied, that they must be convinced, that they must be satisfied or even that they must be satisfied so that they can feel sure.[45] In truth, of course, no formula is in itself adequate or inadequate, for, as Lord Hailsham put it in *Sodeman's* case, the " question whether or not the language used was enough clearly to bring the matter home to the jury in the particular case . . . is not a question of general legal importance, but only a question of the exact turn of the phrase." [46] It is always necessary to point out to the jury that the onus remains throughout on the prosecution, *i.e.*, to make it clear to them that they must acquit if they are not convinced by the prosecution even if they reject the explanation put forward by the defence, but as long as the position is made clear it need not be put expressly.[47] So far as the quantum of proof is concerned, it is suggested that a proper direction to the jury is, in substance, that they must be satisfied by " the degree of probability . . . commensurate with the occasion," which in a criminal case is necessarily something more than a balance of probabilities and something less than what is sometimes, rather unhappily, called " strict " proof, that is to say, the sort of proof required to establish a scientific hypothesis.[48] (It may be observed, in parenthesis, that the standard of scientific proof is not absolute. It seems, for example, that the quantum of proof required to establish a causal connection between smoking and lung cancer is less for a medical adviser than it is for a tobacco manufacturer.)

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[41] *Mancini* v. *D. P. P.* [1942] A.C. 1, 12.

[42] The judgment appears particularly unsatisfactory on the question whether the judge properly directed the jury that, even if they did not believe Blackburn's explanation, they ought not to convict him unless they were satisfied by the evidence called for the prosecution.

[43] An article published in a previous issue of this *Review* ([1957] Crim.L.R. 566, 570) referred to the suggestion, implicit in Professor Glanville Williams' comment on *Blackburn's* case, that the Attorney-General should have granted a certificate under s. 1 (6) of the Criminal Appeal Act and pointed out that the question whether the Court of Criminal Appeal has correctly applied an accepted principle of law to ascertained facts is not one suitable for the consideration of the House of Lords: see the comment of Lord Sumner in *Thompson* v. *R.* [1918] A.C. 221, 236.

[44] (1952) 36 Cr.App.R. 14.

At the beginning of this article attention was drawn to the fact that, notwithstanding the plain words of section 4 (1) of the Criminal Appeal Act and the express decision of the House of Lords in *Woolmington's* case, the Court of Criminal Appeal has indicated very clearly that in cases of capital murder it will not be prepared to consider applying the proviso to that section. The principle governing the application of the proviso is clearly established: it may be applied if, and only if, the court is satisfied that a reasonable jury, properly directed and hearing only the evidence admissible, would have convicted.[49] In applying that principle the court presumably requires to be satisfied in the same way that a jury has to be satisfied by the evidence called before it. Can it possibly be the case that when an appeal against a conviction for capital murder is being heard the court, with the approval of the Lord Chief Justice, proposes to apply a standard of proof different from that applicable in other types of case ?

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[45] [1955] Crim.L.R. 464–474, *passim*.

[46] [1936] 2 All E.R. 1138, 1141. See also [1951] P. 35, 36, *per* Denning L.J.

[47] This is thought to be a matter of common sense rather than law, but if any authority is required for it, it may perhaps be found in the judgment in *Blackburn's* case.

[48] *Preston-Jones* v. *Preston-Jones* [1951] A.C. 391, which rejected the remarkable submission that a standard of proof even higher than that appropriate in criminal cases is required to establish adultery where the result may be to bastardise a child. See also *Gaskill* v. *Gaskill* [1921] P. 425. " Strict " proof has also been referred to as " proof beyond a shadow of a doubt," as to which see *Miller* v. *Minister of Pensions* (1947) 63 T.L.R. 474.

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[49] *Stirland* v. *D. P. P.* [1944] A.C. 315, in which the House of Lords approved the explanation given by the Court of Criminal Appeal in *R.* v. *Haddy* [1944] K.B. 442 of Lord Sankey's dictum in *Woolmington* v. *D. P. P.* [1935] A.C. 462, 482–483.

The Davenport Case

By J. C. Smith

(*continued from p.* 650)

R. v. *Walsh*

A word must be said about *R.* v. *Walsh* (1812) R. & R. 215, the criminal proceeding which arose out of the same transaction as *Taylor* v. *Plumer*. Walsh was charged in one count with larceny of the cheque for £22,200 which he received for the purpose of being laid out in exchequer bills. His conviction on this count was held wrong " because there was no fraud or contrivance to induce Sir Thomas Plumer to give the cheque, because it could not be called his goods and chattels, and was of no value in his hands." [16] Now the " fraud or contrivance " was relevant only if Walsh was made a bailee of the cheque. If he became the owner of it that would establish conclusively that he could not be guilty of larceny whether there was fraud or not. If, however, Walsh was a bailee then he was guilty of the larceny by a trick if, but only if, the bailment was induced by fraud; if it was not, he was guilty of no crime at common law. A bailee could not be guilty of larceny, except by breaking bulk, until 1857.[17] The inference to be drawn from the first reason given by the court is, then, that the court treated Walsh as a bailee of the cheque.

Walsh was charged in another count with stealing the bank notes which he received for the cheque. It was held that he was not guilty of larceny of these because the prosecutor " had never had possession of the money received at the bankers, so that it could not be called his money." Now if Walsh was a bailee of the cheque, his position with respect to the notes seems precisely analogous to that of George in *R.* v. *Governor of Holloway* with respect to the money raised on the draft; and of De Banks with respect to the money received for the horse. But, in 1832, there was no crime of larceny as a bailee; and there could be no larceny at common law from one who had never had possession of the thing in question: *R.* v. *Bazeley* (1799) 2 Leach 835. It seems plain, then, that Walsh was acquitted of stealing the bank notes from Plumer simply because, as the court said, Plumer " had never had possession " of them. This ruling certainly does not show that Plumer was not the owner of the notes. On the contrary, it suggests that he was. If Walsh had become the owner of the notes that would have been an even more fundamental reason why he could not have been guilty of larceny. The fact that the court puts its opinion on the point of possession tends to show that Walsh was not the owner of the notes.

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[16] The second reason given seems to have been repudiated by later cases, in which it has been held that a cheque in the hands of the drawer is of value and can be stolen from him by his servant. *Metcalfe* (1835) 1 Mood. 434; *Heath* (1838) 2 Mood. 33.

[17] 20 & 21 Vict. c. 54, s. 4.

Definition of " Property " in the Larceny Acts

The theory here advanced gains some further support from section 1 of the Larceny Act, 1861, and section 46 (1) of the Larceny Act, 1916, which contain a provision which, on its plain meaning, seems to be an exact embodiment of the rule in *Taylor* v. *Plumer*. The 1916 Act provides that the term " property " includes:—

> " . . . not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

The only cases in which this provision seems to have been invoked are cases of receiving stolen goods, where the effect of it is that the attribute " stolen " attaches, not only to the property which has been originally stolen, but also to any property into which it has been converted. So in *D'Andrea* v. *Woods* [1953] 1 W.L.R. 1307, where the accused received money which he knew to be the proceeds of stolen savings stamps, he was held guilty of receiving the *money,* knowing it to be stolen, contrary to section 33 of the Larceny Act, 1915.[18] There is, however, nothing in the Act to confine the provision to such cases, and there would seem to be no reason why it should not be invoked in cases like *Davenport* and *Gale* to establish that the attribute of ownership continues to attach to the property in its changed form.

A strict and literal application of the provision would, in fact, have simplified the result in both cases. Gale undoubtedly received the *cheques* for and on behalf of his master from a third party in the course of his duty and within the scope of his authority. If the property originally in Gale's possession, the cheques, were taken to " include " the property into which they were converted, the money, the facts would have to be treated as if the money was received in precisely the same manner and, indeed, at the same time as the cheques. If the money into which he changed the cheques is to be identified exactly with them, then the operative receipt was the receipt of the cheques and all difficulty disappears from the case. By a precisely similar process of reasoning Davenport could have been convicted, not of embezzlement (for the cheques were never in his possession but only in his custody), but of larceny as a servant of the money into which he had converted the cheques entrusted to him by his master.

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[18] In *Taylor* v. *Plumer* the court discussed the case: " If A entrust his agent with money to purchase a horse, and the agent, instead of purchasing a horse, purchase a carriage;" and Lord Ellenborough concluded that A is entitled to the carriage. Mr. Turner says that if the agent, B, without A's knowledge, had sold the carriage to an innocent purchaser, X, and then absconded or gone bankrupt, A could not have claimed the carriage from X as property stolen from him by B. Whatever the position in the civil law, section 46 (1) at least makes it clear that, in the criminal law, the carriage would be stolen goods, and only lack of *mens rea* would save X from conviction under section 33.

It is clear, however, that in both *Gale* and *Davenport* the courts considered the relevant receipt to be the receipt of the money and not that of the cheques, and that the courts have never applied the provision in this strict and literal manner. There would seem to be no reason, however, why the provision should not be invoked to justify the less far-reaching proposition which this article seeks to establish ; and, at the very least, it shows that the notion of following property into its product is not foreign to the criminal law.

The relevance of forgery

It has been submitted that Gale no less than Davenport was acting outside the scope of his employment in receiving cash for his employer's cheques. Gale was guilty of embezzlement and Davenport of larceny of the cheques. Does it make any difference that Davenport was also guilty of forgery of the cheques whereas Gale was not ? From the point of view of scope of employment, clearly not. Employers authorise their servants to forge their cheques neither more nor less than they authorise them to embezzle them. Is there then, any difference between the duty of a servant with reference to, on the one hand, the proceeds of his master's cheque which he has *forged* and wrongfully cashed and, on the other, the proceeds of his master's cheque, wrongfully cashed, but not forged ? It was submitted in 19 M.L.R. 39 that there is no distinction between the cases ; that in both the cheque is the master's property and therefore so is the proceeds of it. *Wilson and Meeson* v. *Pickering* was relied on for that proposition. That was a case in which a servant forged his master's cheque in precisely the same manner as did Davenport, and paid it to his personal creditor, one Pickering, who obtained payment of it through her bankers and was held liable in an action for conversion of the cheque, and, perhaps, for money had and received.

Mr. Turner[19] treats the case as if it were simply an action for money had and received but there is, with respect, no justification for this. The action was "for damages for conversion of the cheque or alternatively as money received by the respondents for the use of the appellants," (Morton L.J.) and, as the court simply allowed the appeal without reference to the cause of action, it must be assumed that the plaintiff succeeded on both causes of action or at least on the first named. The fact that the action for conversion succeeded establishes that a master owns a cheque which is forged by a servant in the manner in which Davenport forged the cheque.

Mr. Turner says that in *Wilson and Meeson* v. *Pickering* there was "no word whatever to the effect that W. & M. could trace their cheque form into the cash drawn by P. as 'belonging to' themselves." Yet Morton L.J., having held that P. had no title to the cheque, said: "I would add that in the present case I can draw no distinction between the title to the cheque itself and the title to the money obtained or represented by it": and he referred to the speech of Lord Halsbury in *Great Western Railway* v. *London and County Banking Company* [1901] A.C. 414. That was a case in which one, Huggins, had obtained a cheque from the appellants in circumstances in which he got possession but no title. He endorsed the cheque and handed it to the respondents who received payment of it. It was held (to quote the headnote) "that having no title to the cheque the respondents took no title to it or to the money, and were liable to the appellants for the amount of the cheque" Lord Halsbury said (page 418) that "the supposed distinction between the title to the cheque itself and the title to the money obtained or represented by it seems to me to be absolutely illusory." Lord Lindley, too, said that title to money got by means of the cheque would be as defective as title to the cheque itself.

It is submitted, then, that *Wilson and Meeson* v. *Pickering* does establish that a master, whose cheque form is forged by a servant in the manner in which Davenport forged the cheques, is the owner of the cheque and also of the proceeds of it. It is, therefore, further submitted that the fact that there was forgery in *Davenport* and no forgery in *Gale* is irrelevant.

Conclusion

The proposition that a servant can commit embezzlement only of property which he has received while engaged in performing the duties of his service is one which can be maintained only by overruling, not merely the Court of Criminal Appeal's 1954 decision in

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[19] [1956] Crim.L.R. 731.

Davenport, but also the 1873 ruling of the Court for Crown Cases Reserved in *Gale*. Mr. Turner would not, presumably, be prepared to go so far as this. The alternative is to hold that the cases of *Wilson* and *Aitken* are wrong, and that the proposition in Kenny is (and always has been) wrong. There can be no doubt which course is enjoined by the "ancient and salutary doctrine of *stare decisis*" on which Mr. Turner lays such emphasis. Decisions of the Court of Criminal Appeal and the Court for Crown Cases Reserved must be preferred to rulings by recorders when, as here, there is a conflict between them.

The view advanced in 19 M.L.R. 39, and in this article, that money received by the servant outside the scope of his authority, is nevertheless received "for or on account of" the master, if only it becomes the master's money, has the distinct advantage of reconciling *Gale* and *Davenport* with the other authoritative decision in the field, *Cullum*. The theoretical basis on which the distinction between the cases has been put, may not have been explicitly stated in them; but, it is submitted, a great deal of support can be found for it in the decisions, as a perusal of the article in 19 M.L.R. 39 will show.

Compensation in Criminal Proceedings

By C. HOWARD, LL.M.

An article on restitution in criminal proceedings in an earlier number of this Review[1] opened with the remark that the subject was both of practical importance and neglected. It was suggested that the neglect arose from the hybrid nature of restitution which, so far as criminal proceedings are concerned, is found in the vague borderland between civil and criminal law. These comments apply equally well to monetary compensation for loss or injury brought about by a crime. As in the case of restitution, there appears to be no convenient account of the law relating to the recovery of compensation in criminal proceedings. This law is to be found tucked away in the odd corners of over a dozen statutes. Some of these corners are well known, but the existence of some of the others will probably come as a surprise. No attempt has been made by the legislature to preserve, still less to introduce, order in the subject.

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[1] [1957] Crim.L.R. 305 and 377.

A distinction may be drawn between compensation for personal injury and compensation for loss of or damage to property. So far as personal injury is concerned the principal enactment is the Criminal Justice Act, 1948, s. 11 (2). Under this section compensation may be awarded without limit by a superior court, and up to £100 by a court of summary jurisdiction, provided, and this proviso is an important limitation on the scope of the subsection, provided that the offender is either put on probation or discharged under the Act. The compensation is recoverable from the offender. If the injury chances to be suffered within the City of London or the Metropolitan Police District, compensation up to £10 can be recovered in a court of summary jurisdiction after conviction of the offender under the City of London Police Act, 1839, or the Metropolitan Police Act, 1839, as the case may be. The compensation is recoverable from the offender. If injury is inflicted by an animal which has so acted because of cruel treatment by another person, compensation up to £10 can be recovered after conviction of the person responsible under the Protection of Animals Act, 1911. The compensation is recoverable from the offender. There is also one case where compensation for personal injury can be recovered in criminal proceedings from the State. If a man is killed in attempting to arrest the perpetrator of, in general, a felony of violence against the person, his widow or dependants may claim compensation from the State under the Criminal Law Act, 1826, s. 30.

Compensation for loss of or injury to property is to some extent bound up with restitution, which was dealt with in the previous article referred to above. The restitution position is, briefly, that the owner of stolen property may recover it, after conviction of the thief, from any person into whose possession it has come. The court of conviction may order that the property be summarily restored to him: Larceny Act, 1916, s. 45. This does not apply to negotiable instruments, or to money which has passed in currency, or where the offender has passed an apparent title to the property. If the proceeds of selling the stolen articles are taken from the thief the owner may accept them instead of the return of his property. If some or all of his property is irrecoverable and no, or insufficient, proceeds of sale have been taken from the thief, the owner's claim is no longer for restitution but for compensation. The principal enactment is the Forfeiture Act, 1870, s. 4, under which compensation up to £100 can be recovered for loss of property. Two notable limitations on the scope of this section are that it does not apply to damage to property as opposed to loss, and that it extends only to felonies. The Criminal Justice Act, 1948, s. 11 (2), already mentioned in connection with personal injury, does not suffer from these restrictions but has limitations of its own. Under this section compensation for loss of or damage to property may be awarded without limit by a superior court, and up to £100 by a court of summary jurisdiction, provided that the offender is either put on probation or discharged under the Act.

In addition, anyone who suffers loss of or damage to property by an offence for which there is a conviction under any of the following statutes may be able to recover compensation, which is unlikely to exceed £20 and in most cases will be much less: Metropolitan Police Act, 1839; City of London Police Act, 1839; Larceny Act, 1861; Malicious Damage Act, 1861; Protection of Animals Act, 1911; Criminal Justice Administration Act, 1914.

As with restitution,[2] pawnbrokers have had special attention paid to them. The owner of property unlawfully pawned by another may not only recover it from the pawnbroker after the offender has been convicted,[3] but also obtain a small degree of compensation under Pawnbrokers Act, 1872, s. 33, for any loss sustained.

All these enactments contemplate recovery of any compensation awarded from the offender. However, as with personal injury, there is one case where compensation is recoverable from the state. This is riot. Anyone who suffers loss of or damage to property by riot may be able to obtain compensation for his loss from the local police authority under the Riot (Damages) Act, 1886, or under the Merchant Shipping Act, 1894, s. 515.

Lastly, in this preliminary survey, a word about third parties. The person to whom compensation is normally available will be anyone directly harmed by the criminal act. Innocent third parties, however, may suffer indirect damage by having a restitution order made against them. The question then arises whether they can obtain compensation for this loss. The only statute which expressly recognises the problem is the Larceny Act, 1916, s. 45 (3), but this depends on the offender, on being arrested, having some money out of which compensation can be ordered. Apart from this, it is possible that an innocent purchaser from the offender might bring himself within the terms of the Forfeiture Act, 1870, s. 4, or the Criminal Justice Act, 1948, s. 11 (2), to both of which reference has already been made. If the third party is a pawnbroker he may also be able to rely on the Pawnbrokers Act, 1872, s. 33.

These various enactments must now be considered in detail. It is difficult to find any useful classification in the disordered state of the law, but perhaps the most helpful order of presentation will be to take first those statutes which apply to personal injury only; secondly, those having reference to both personal injury and property; thirdly, those restricted to property, including pawned property; and lastly, those applicable to third parties.

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[2] [1957] Crim.L.R. 386.

[3] Under the Pawnbrokers Act, 1872, s. 30. See footnote 2, above.

Personal Injury

Criminal Law Act, 1826, s. 30

This section gives power to a court before whom anyone is "charged" with certain offences to order compensation to be paid out of public funds to the widow, children, or parents, of "any man [who] shall happen to be killed in endeavouring to apprehend" the offender. One or two points arise on the wording. The use of the phrase "any man" in conjunction with an express reference to his widow seems to limit the section to the male sex. Moreover, no degree of injury will suffice; the attempted arrest must result in death. On the other hand a conviction does not appear to be necessary; it is enough if someone is merely charged. The compensation is only payable to a child of the deceased if he was a widower, and only to a parent if he left neither wife nor child. The amount of the award is in the court's discretion.

The offences to which the section applies are set out in section 28 of the Act: murder; shooting or attempting to shoot at people; stabbing; poisoning; procuring miscarriages; rape; burglary; housebreaking; robbery; arson; horse, bullock, or sheep stealing; or being an accessory before the fact to any of these; or, finally, receiving. This is a fairly eclectic selection, but it has its oddities. It seems a little hard, for example, that the key to public funds should turn on whether a bullock has not after all remained a bull. The purpose of including an attempt to shoot but not an attempt to do anything else is not altogether apparent. Indeed, no great exercise of the imagination is necessary to produce the strangest anomalies from this ancient section. However, the courts have not felt themselves unduly fettered by its precise wording, for both attempted murder and grievous bodily harm have been held to be within section 28.[4]

The only example in the reports of an order under the section appears to be *Platel*,[5] where Grantham J. at the Central Criminal Court awarded £233 to the widow[6] of a man shot whilst attempting to arrest another man who had shot a police constable. That was in 1903, but it is thought that orders have been made more recently. In *McManus* v. *Armagh C. C.* [1952] N.I. 38 compensation of £2,700 was awarded to a widow under a similar Irish statute.[7]

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[4] *Durkin* (1837) 2 Lew. 163; *Platel* (1903) 38 L.J.News. 273.

[5] See footnote 4, above.

[6] The report says "to the widow and family," but the strict words of the section appear to preclude payment to any family other than the widow if the widow is still alive.

A curious point seems to arise over appeals from orders made under this section. Rule 11 of the Criminal Appeal Rules, 1908, provides that orders made under, *inter alia,* the Criminal Law Act, 1826, s. 30, shall be suspended pending appeal by the accused. This rule appears to have been made under a power contained in the Criminal Appeal Act, 1907, s. 6. This power, however, extends only to the making of rules concerned with orders of restitution of property. An order under the Criminal Law Act, 1826, s. 30, is not one for restitution of property. In the marginal note the word " compensation " is used. In the body of the section neither the word " compensation " nor the word " restitution " is used, but the phrase " sum of money." Therefore, unless the terms " compensation " and " restitution " are to be taken as synonymous, which is impracticable, rule 11 would seem to be *ultra vires* so far as it purports to deal with orders other than for restitution of property, and, in particular, so far as it refers to the present section. But even if this suggestion is well founded, it is probably of little practical importance.

Personal Injury and Damage to Property

Criminal Justice Act, 1948, s. 11 (2)

The text of this subsection is as follows:—

> " A court, on making a probation order or an order for conditional discharge or on discharging an offender absolutely under this Part of this Act, may, without prejudice to its power of awarding costs against him, order the offender to pay such damages for injury or compensation for loss as the court thinks reasonable ; but, in the case of an order made by a court of summary jurisdiction, the damages and compensation together shall not exceed one hundred pounds or such greater sum as may be allowed by any enactment other than this section."

The Criminal Justice Act, 1948, is the most modern statute to deal expressly with compensation. Its aims were primarily criminological. The purpose of section 11 (2) seems to have been to bring the new enactment into line on the subject of compensation without disturbing the existing law. Hence the limitation by reference to the treatment of the offender instead of by reference to the crime he has committed (a course which not only indicates the modernity of section 11 (2) but also makes it unique in this field), the £100 limit on summary jurisdiction,[8] and the express saving for other enactments.[9] It is important to remember that by section 3 (3) " damages " or " compensation " cannot be included as part of a probation order. This is " without prejudice " to section 11 (2). The effect is that whilst compensation recoverable from the offender may be awarded on the making of a probation order, the offender cannot be convicted of a breach of probation if he defaults. The correct procedure on default is to enforce the order in the same manner as an order for costs. This is considered below. Another consequence of the concern of the Act with treatment and not guilt is the absence of any reference to the distinction between felony and misdemeanour which, as will be seen, figures largely in the older law.

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[7] The Criminal Injuries (Ireland) Act, 1919. This statute requires proof that the deceased was murdered for the compensation provisions to apply. The English statute only requires that he be killed, which seems to let in, for example, accident.

The section does not require anyone to apply for an order to be made, or contain any restriction on the persons eligible for compensation. The court may therefore act on its own initiative in these respects. The distinction between " damages " and " compensation " appears to have no significance. The phrase " damages for injury or compensation for loss " is capable on a reasonable construction of covering both personal injuries and loss of or damage to property. In the Australian case of *Wilson* v. *Johnson*[10] it was argued that the words " injury or loss " were not apt to cover an allowance in money for pain and suffering consequent upon injury. This argument was rejected by the court. There is no reference to evidence in the section. The court is therefore not confined to evidence led in the trial when considering whether to award compensation. Any other relevant matter brought forward when the application, if any, is made, or which the court asks for, may be taken into consideration. However, although superior courts are the beneficiaries of a notable break with tradition in that they may award as much compensation as they think is reasonable, without an arbitrary upper limit, no indication is given of the factors to be taken into account in deciding what is reasonable.

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[8] An oblique reference to the Forfeiture Act, 1870, s. 4, and the Magistrates' Courts Act, 1952, s. 34. Both of these are treated below.

[9] Similarly s. 12 (1), which, in accordance with the criminological aims of the Act, excludes probation or discharge from the status of conviction for any purpose other than that of Part I of the Act itself, takes effect without prejudice to revesting or restitution on conviction: s. 12 (3) (*b*).

[10] (1932) 32 S.R. (N.S.W.) 326.

Several arguments can be put forward. Starting with the proposition that the section has no point unless there has been a loss to someone, it can be said that the court should award a sum reasonably adequate to repair the loss. On the other hand, the general intention of the Act was to improve existing methods of dealing with offenders. From this point of view it can be argued that the court should have regard only to what the defendant is reasonably able to pay. This approach can be supported also by reference to the reformative possibilities of making compensation. There is also the point that a compensation order could lead to prison in default. Since, *ex hypothesi,* the court, when acting under section 11 (2), has considered imprisonment to be unsuitable, it would be unfortunate if this result eventually followed indirectly through the making of an unwise order for compensation. But probably the most satisfactory way of interpreting " as the court thinks reasonable " is to assume that, mindful of the interests of both the injured party and the offender, and through them of society at large, the legislature intended to leave it open to the court to take all the circumstances into account. It is submitted that the court should not be swayed exclusively by the claims of either party to consideration. The injustice done to the claimant should be weighed against the fact that the wrongdoer is being put upon probation or discharged. The probable future behaviour of the offender is perhaps the most important single factor to be borne in mind.

It is provided by section 11 (3) that an order under section 11 (2) may be enforced in the same way as an order for costs. Where both compensation and costs are awarded they may be enforced as a single order for costs. By the Costs in Criminal Cases Act, 1952, s. 10 (1) and (2), such orders are " enforceable in the same manner as an order for payment of costs made by the High Court in a civil case." Where any money has been taken from the offender on arrest the court may apply it to the payment of costs or compensation awarded against him. By section 10 (3) of the same Act an order for costs made by a magistrates' court " shall be enforceable as a sum adjudged to be paid by the conviction." This means that warrants of distress and committal can be issued in default of payment: Magistrates' Court Act, 1952, s. 64. By section 126 (3) it is confirmed that references in that Act to sums adjudged to be paid by a conviction include " costs, damages or compensation " ordered.

There are some dicta by Lord Goddard C.J. in *Parry*[11] which if taken literally would proscribe coercive imprisonment in the enforcement of an order under this section. The Criminal Justice Act, 1948, s. 13, empowers a court before which an offender is convicted on indictment of a felony the sentence for which is not fixed by law, to fine the offender in addition to dealing with him in any other manner within the competence of the court. The only question in the case was whether " any other manner " included probation so that both a fine and a probation could be imposed at the same time. It was decided that section 13 did not enable this to be done. In the judgment of the court the Lord Chief Justice drew a distinction between sums awarded under section 11 (2), which could be imposed together with a probation order, and fines. The latter, being intended as punishment, could be enforced by imprisonment; the former, not being intended as punishment, could not be so enforced.

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[11] [1951] 1 K.B. 590.

It is submitted that when he said this Lord Goddard's mind was directed to punitive imprisonment and not to coercive imprisonment for civil debt. His distinction was, therefore, as is often the case in the borderland between the civil and the criminal law, drawn too widely. An incidental result of the decision is that if a court is really determined to fine an offender as well as put him on probation, it must do so under the guise of compensation and within the limit of " reasonable." That attempts to evade the law in this fashion are not unknown is demonstrated by *Highgate Justices*[12] (excessive costs).

Metropolitan Police Act, 1839, s. 62

This section provides that anyone who causes injury or damage by committing any offence under the Act within the Metropolitan Police District[13] may be apprehended, with or without warrant, " by any constable." The constable may then suggest that the malefactor repair the injury or damage by handing over " amends " on the spot " to the satisfaction of the person aggrieved." If this proposal is unfavourably received the offender may be taken before a magistrate, who, after conviction and in addition to sentence, may order him to pay to the party aggrieved compensation not exceeding £10. In the trial of the offence the evidence of the party aforesaid may be admitted, but if it is not corroborated " the sum ordered as amends shall be . . . applied in the same manner as a penalty."[14]

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[12] [1954] 1 W.L.R. 485 (excessive costs).

[13] For the area of which see the Police Act, 1946, s. 16. A corresponding provision for the City of London is to be found in the City of London Police Act, 1839.

[14] *i.e.*, in accordance with the Magistrates' Courts Act, 1952, ss. 114 and 126 (3).

This, it may be observed in passing, gives rise to the extraordinary situation that there can be a conviction in circumstances of sufficient doubt to justify withholding compensation. There is also the curious anomaly that if the wrongdoer can be persuaded to repent when he is first arrested, one may extract sufficient amends to satisfy the person he has aggrieved, but that if he is obdurate and insists on more pageantry of the law than a mere constable can provide, only £10 can be recovered.

In truth, the importance of the Metropolitan Police Act at the present day is capable of exaggeration. Perusal of the extant sections reveals an antiquated, rather maritime, statute, reminiscent of the more regrettable habits of nineteenth century dockers. If the statute law revisers ever have the temerity to lay hands on our criminal law, the whole Act could be repealed without loss. However, in the meantime anyone who suffers the misfortune of having his furniture wilfully dropped into the Thames may like to know that he is specially catered for (s. 28).

Protection of Animals Act, 1911, s. 4

By this section anyone who, by treating an animal with cruelty within the meaning of the Act, causes injury or damage to anyone else, or to property, or to the animal itself, may upon conviction be ordered to pay to the person aggrieved such compensation, not exceeding £10, as the court thinks reasonable. The person seeking it must specifically apply for the compensation. It is not clear if the £10 limit applies only to the amount of compensation to be awarded to any one person, or if it is intended to indicate the total sum the offender can be ordered to pay regardless of how many applicants there are, but the former interpretation is thought to be the correct one. The section contains two provisos, first, that it shall not prevent the taking of other legal proceedings in respect of the same injury or damage, but " so that a person be not twice proceeded against in respect of the same claim " ; and second, that it shall not affect liability to conviction and punishment for the offence of cruelty. The second proviso needs no comment. The first may amount to an absolute bar on a subsequent action for damages but there is no authority on the point. It may be that an action could be maintained for damages in excess of the £10 recoverable under this section, but in view of the wording quoted this seems doubtful.

The practical use of the section is considerably reduced by the limit of £10. If a valuable animal were injured, for example, or serious illness resulted from attack by some frantic creature, the compensation would be useless. Probably such misfortunes were thought by the framers of the statute to be more properly the subjects of actions for damages, this section being intended only to provide speedy compensation for minor items of loss such as the traditional seat of one's trousers. Nevertheless, the doubt about the effect of the first proviso should be borne in mind before any application is made, unless the damage clearly does not exceed £10. No time limit is specified within which the application must be made, but it may be that the words " upon conviction " imply that any subsequent time is too late. Any sum awarded is no doubt recoverable in the same manner as a civil debt. There is no definition of " property " in the Act but this is unlikely to cause any difficulty, if only because there is no record of the section ever having been used.[15]

Damage to Property

Forfeiture Act, 1870, s. 4

The text of this section is as follows:—

> " It shall be lawful for any such Court as aforesaid, if it shall think fit, upon the application of any person aggrieved, and immediately after the conviction of any person for felony, to award any sum of money, not exceeding one hundred pounds, by way of satisfaction or compensation for any loss of property suffered by the applicant through or by means of the said felony, and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted, and the order for payment of such amount may be enforced in such and the same manner as in the case of any costs ordered by the Court to be paid under the last preceding section of this Act."

This section is the major enactment in English law enabling a criminal court to award compensation for loss of property. It is expressly limited to felony (although not to any particular class of felony); the " Court as aforesaid " is therefore the court convicting of felony. Although there is no express decision on the point it seems quite clear that the only power to make awards of this kind derives from statute. For this reason, as in the case of restitution orders under the Larceny Act, 1916, s. 45 (2),[16] it can be exercised only by the court of conviction. There was formerly some doubt whether a court of summary jurisdiction had power to make an award under the section. This doubt has now been set at rest by the Magistrates' Courts Act, 1952, s. 34, which expressly extends this section to summary courts. It is unfortunate that the power to make awards turns on the antiquated distinction between felony [17] and misdemeanour.

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[15] Those interested may like to compare the South African Prevention of Cruelty to Animals Act, 1914, s. 6, which is similar, but better drafted, and imposes a more sensible limit of £100 on compensation.

[16] See [1957] Crim.L.R. 315–316.

The Application

It seems clear from the wording that unless someone applies to the court no award can be made. For this reason it is desirable, especially in summary courts, that members of the public who could benefit should be asked by the bench if they are aware of their rights under the section.[18]

The phrase " immediately after the conviction " might have been expected to cause difficulty. It has done. A remarkable, and, one hopes, infrequent example of this is the summary case of *Bjorkman*.[19] The accused had been convicted of larceny. A restitution order [20] was made against pawnbrokers to whom he had pawned the stolen property. The pawnbrokers then applied for compensation under this section.[21] The magistrate adjourned the application so that he could consider the doubt mentioned above as to whether he was a court " as aforesaid." After an interval of some weeks he had decided that he was such a court but that he still could not award compensation because it was no longer immediately after the conviction.

It seems that he might have overcome his difficulty by making an oral order and then staying formal recording and enforcement of it until he had had time for reflection. In *Jones* [22] the accused had executed a bank order directing payment to the prosecutor of a sum by way of compensation. Perhaps because the accused was under arrest the bank refused to obey the order until a judge said something on the subject, so at the trial the judge was asked to " authorise " payment. Remarking that it was unnecessary, he did so, orally. Perhaps because everyone knew that the bank order was in existence, no one took the trouble to have the judge's words formally recorded. The accused then had second thoughts, possibly because the effect of his repentance had not been all that he hoped, and countermanded the order. The prosecutor therefore went back to the trial judge and applied for compensation under section 4. This application was opposed on the ground that it was no longer immediately after the conviction. The judge surmounted the difficulty by holding that he had already made an oral order at the proper time which only needed to be formally engrossed. In saying this he apparently had in mind his " authorisation." He was upheld by the Court of Criminal Appeal. The oral order having been made, the interval of time before recording it made no difference. One may without disrespect observe that the court was evidently influenced by the behaviour of the accused and therefore perhaps astute to find a way round the objection, for whether the trial judge actually had made an order was by no means clear.

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[17] Presumably felony in this context includes treason; but is there not an element of hyperbole in this?

[18] " Prosecutor " at (1951) 115 J.P. 148, apparently a practitioner with experience of local courts, vouches for cases where this has been done successfully. Compare (1937) 1 *Journal of Criminal Law* 10: " a matter of rare occurrence " to find this section invoked in summary courts. Probably the Magistrates' Courts Act, 1952, s. 34, has helped in this respect.

[19] (1937) 1 *Journal of Criminal Law* 10.

[20] Under Larceny Act, 1916, s. 45.

[21] Probably they did not apply under L. A., s. 45 (3), because no money had been taken from the accused on his arrest. This subsection is considered below.

[22] [1929] 1 K.B. 211.

With this may be contrasted the Canadian case of *Cohen and Miller*[23] where precisely opposite reasoning was used to achieve, no doubt, the same end. There the conviction was on July 5th and the accused was remanded for sentence until July 10th. On July 10th an application was made, for the first time, for compensation under a section of the Criminal Code then in force which also contained the " immediately after " requirement.[24] The objection on this occasion failed on the elusive ground that the conviction of July 5th was a conviction only in a " broad and general sense," not in " legal and authentic form " until placed on the record. The application was therefore allowed. It does not appear whether the court made haste in accordance with its own logic to record the conviction before hearing the application, or whether if the applicant had spoken up on July 5th he would have been sent away, to return to make another application on July 10th. If the issue should arise in England, these points may be borne in mind.[25] In this event it is to be hoped that instead of indulging in unsatisfactory pronouncements about formal records the court will prefer simply to construe " immediately after " as meaning " without unreasonable delay."

There may be some support for this in the Australian case of

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[23] [1923] 1 D.L.R. 687.

[24] S. 628 (1) of the 1954 Code now specifies that application must be made " at the time sentence is imposed." This is a great improvement.

[25] *Cf.*, Magistrates' Courts Act, 1952, s. 87 (3): for the purposes of application for a case to be stated " the day on which the decision of the magistrates' court is given shall, where the court has adjourned the trial of an information after conviction, be the day on which the court sentences or otherwise deals with the offender."

Clements.[26] There, also, the accused had been remanded for sentence and application was not made until sentence was passed. The court simply decided that the application was within the statute.[27] Nevertheless, it must be admitted that " immediately " has a mandatory ring about it. Decisions that a matter of weeks is not immediately cannot be quarrelled with,[28] but a few days might well be reasonable.

The Loss

The section applies to loss of property only. The limitation on its scope imposed by the exclusion of personal injury has been quite unnecessarily accompanied by a drastically literal interpretation of the word " loss." In *Bowman* [29] the accused had damaged a safe but not taken any of its contents. Quarter Sessions made an order for £7 compensation. The Court of Criminal Appeal set this order aside on the ground that there was no evidence of loss within the meaning of the section. There is no reference to the evidence upon which the court must rely when application is made. This leaves it free to hear evidence proving loss which may not have been put in at the trial.[30] The phrase " through or by means of " has given rise to no recorded problems. It would seem wide enough to cover, for example, property lost whilst giving chase to a felon. If it came up for consideration recourse would doubtless be had to current legal opinions on causation.

The Award

There is a limit of £100 on the compensation which can be awarded under the section. No very good reason why this should continue suggests itself. At the present day it is unrealistic for a criminal court to be able to impose a fine of thousands of pounds for, for example, an income tax offence, and yet have its discretion in compensating a private individual limited to £100. If it be thought that magistrates should not be free to award large sums, a distinction could easily be drawn between them and superior courts.

In the second part of the section the award is ranked as a judgment debt. The effect of this is obscure. Can someone aggrieved obtain his first £100 in this way and then sue for the balance to which he thinks he is entitled, or does an award by the criminal court estop an action for damages by judgment? It is submitted that estoppel by judgment does not arise when an award is made. In the first place it is a reasonable inference from the context that the expression "judgment debt" is employed to indicate the status of the award when it comes to enforcement, and not as a disguised bar to an action for damages. Secondly, in the absence of express words or necessary inference[31] it is, on principle, not to be presumed that an award by the criminal court bars the civil remedy,[32] *a fortiori* where the criminal court has an upper limit on its discretion, as here. This contention is reinforced by the express inclusion in some statutes of an explicit bar.[33] Lastly, it is contrary to the attitude of the courts, when in doubt, to suppose the civil remedy barred.[34]

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[26] (1895) 21 V.L.R. 237. I have not had access to the original reports. These are at 21 V.L.R. 237, 17 A.L.T. 138, and 1 A.L.R. 92.

[27] Which required it to be made " immediately after " conviction. The relevant Victorian statute at present, the Crimes Act, 1928, ss. 471–473, makes no reference to " immediately after."

[28] *Bjorkman* (1937) 1 *Journal of Criminal Law* 10; *Jackow* (1934) 42 Man.R. 121; [1934] 1 W.W.R. 340; 62 C.C.C. 277 (Canada).

[29] (1927) 20 C.A.R. 90.

[30] So decided in *Clements* (1895, Australia): see footnote 26, above.

In *Lovett*[35] the first reported case on section 4, Sergeant Cox, the Deputy-Assistant Judge at Middlesex Sessions, strongly expressed the view that the section contemplated compensation additional to punishment, and not in substitution therefor. The accused had pleaded guilty to larceny of £5 10s. from his employers and undertaken to refund the money. Both counsel suggested that in such a case punishment should be forgone, but Serjeant Cox saw dark threats of condonation of felony in the idea. The power to compensate was "to be exercised with the utmost caution," being susceptible of "many grave abuses." This attitude was unduly conservative. Clearly, there is no fixed rule, much depending on the discretion of the court.

Enforcement of an Order

An award is enforceable in the same manner as an order for costs. The governing statute on the subject is now the Costs in Criminal Cases Act, 1952. By section 10 (1) and (2) costs may be recovered by the same processes as an ordinary civil debt; if money is taken from the offender on arrest it may be applied in satisfaction thereof. By section 10 (3) (*a*) costs awarded by magistrates are enforceable as sums adjudged to be paid by the conviction. This brings them within the magistrates' powers of enforcement set out in the Magistrates' Courts Act, 1952, Part III.[36]

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[31] An example of necessary inference would have been provided, in the absence of judicial authority to the contrary, by the Pawnbrokers Act, 1872, s. 30. See [1957] Crim.L.R. 386.

[32] The damage cannot, of course, be recovered twice; but that relates to quantum, not estoppel.

[33] Game Act, 1831, s. 46; Larceny Act, 1861, s. 109; Malicious Damage Act, 1861, s. 67; Offences Against the Person Act, 1861, s. 45.

[34] See *Leicester* v. *Cherryman* [1907] 2 K.B. 101; *Dyer* v. *Munday* [1895] 1 Q.B. 742; *Hartley* v. *Hindmarsh* (1866) L.R. 1 C.P. 553.

[35] (1870) 11 Cox C.C. 602.

In this connection the Children and Young Persons Act, 1933, s. 55 should be remembered. It provides that a court sentencing a child or young person[37] to a fine, damages or costs may, and in the case of a child must, order that the money be paid by a parent or guardian unless the offence committed by the juvenile is in no way attributable to neglect or fault on the part of the adult. If the court so orders, then by subsection (4) the adult may be proceeded against to recover the sum awarded. The adult may appeal against such an order as an appeal against sentence.[38]

(To be continued)

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[36] ss. 63–76, especially s. 64.

[37] s. 107: a child is one under 14 years; a young person is one over 14 but under 17 years.

[38] subs. (5). The appeal is to quarter sessions from summary courts and to the C.C.A. from superior courts.

Evidence at Quarter Sessions and Assizes

By C. E. S. HORSFORD, *Barrister-at-Law*

General Principles

Admissibility—With a few exceptions, set out below, proof is admissible only of that which is directly relevant.

Relevant means tending to prove or disprove the existence of a state of affairs which is in issue as between the Crown and an accused person or as between the parties.

Exceptions—Proof is admissible of the following matters, although not directly relevant, *viz.*—

1. That the accused is of good character.
2. Under certain defined conditions, that the accused is of bad character.
3. That a witness is of bad character (if the proof tends to show that he cannot properly be believed).

Onus of proof—The onus of proof rests throughout on the prosecution—*Woolmington*, 25 Cr.App.R. 72—except in the few instances where the burden of proof shifts to the defence upon a prima facie case being made out by the prosecution (*e.g.*, under a defence of insanity, or in the offences of possessing housebreaking implements by night, and living on the immoral earnings of prostitution, etc.). In such cases, however, the burden which rests upon the defence is not as great as that which normally rests upon the prosecution. And see *Dunbar* [1957] 3 W.L.R. 330.

Proof consists of any means by which a court or jury may be satisfied beyond reasonable doubt of the existence or non-existence of any relevant fact. " Fact " includes subjective elements, *e.g.*, intention, malice, etc., as well as objective events.

Proof may be effected by: —

1. The testimony of witnesses, either direct, *i.e.*, that they saw, heard, etc., or indirect, *i.e.*, as to circumstances from which relevant inferences may be drawn, *i.e.*, fingerprints.
2. Documents properly proved relevant and admissible.
3. Presumptions. NOTE.—In any case where, either by statute or at common law, some matter is presumed against an accused person " unless the contrary is proved " the jury should be directed that it is for them to decide whether the contrary has been proved, that the burden of proof required is less than

that required from the prosecution in proving a case beyond a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury of the probability of that which the accused is called on to establish: *Carr-Briant*, 29 Cr.App.R. 76.

4. Judicial notice.
5. Inspection by judge or jury in or out of court, *e.g.*, of exhibits, the scene of a crime, etc.
6. Admissions, confessions and statements by an accused person or party. If a statement made by an accused person is for any reason inadmissible it cannot be made admissible by putting it to him in cross-examination: *Treacy*, 30 Cr.App.R. 93.

Evidence of other similar acts—Such evidence is admissible in spite of its being in some cases evidence of other offences; but only:—

1. To prove a state of mind where that is an essential ingredient of an offence, *e.g.*, fraudulent intent, malice, wilfulness, etc.
2. To negative mistake or accident.
3. In sexual cases, to show the existence of a guilty passion: *Shellaker*, 9 Cr.App.R. 240.

But—

(a) There must be a *nexus* or logical connection between the facts of the offence for which the accused is being tried and the other facts sought to be proved in time, method or circumstance.

(b) The other facts must be similar, *i.e.*, of the same kind, *e.g.*, where a person is being tried for false pretences, questions may not be asked for the purpose of eliciting that on some other occasion accused obtained credit by fraud: *Hamilton*, 27 Cr.App.R. 38.

(c) The other facts must be earlier in date than those in issue (any authority to the contrary is of such doubtful authority that it should not be relied upon).

The basis of this rule is that the state of a man's mind can be ascertained only (a) by his statements and (b) by inferences from his behaviour.

If a person can be shown to have done a thing systematically and not merely in an isolated instance, it may be inferred that the thing was done deliberately and not by accident, inadvertence or mistake; but, normally, evidence is only admissible to meet a defence of accident or mistake set up by the accused (*Perkins* v. *Jeffery* [1915] 2 K.B. 702), and not to prove the accused to be of a character likely to commit such an offence: *Cole*, 28 Cr.App.R. 42.

However, in *Harris* v. *D. P. P.*, 36 Cr.App.R. 39, it was laid down that the prosecution may adduce all proper evidence to prove the charge, including evidence of other criminal acts, in order to prove *mens rea* or intent, or to rebut a possible defence of accident without waiting for a specific defence to be raised which calls for rebuttal. The judge, however, always has a discretion as to whether to admit or exclude the evidence in such cases, where its prejudicial effect would be out of all proportion to its value. See also *Sims*, 35 Cr.App.R. 148 and *Thompson* v. *D. P. P.*, 13 Cr.App.R. 61, at p. 78.

Likelihood—As a general rule evidence is not admissible merely to show the likelihood of an accused person having committed an offence, *e.g.*, that he has been previously convicted of other offences, even where they are similar, or that he is generally of bad character. In *Thompson*, 13 Cr.App.R. 61, the House of Lords held that evidence was properly admitted of the possession by a person charged with gross indecency of indecent photographs and powder puffs.

So in *Twiss*, 13 Cr.App.R. 177, where the charges were similar, it was held that the findings of indecent photographs at a man's lodgings was rightly admitted in evidence against him as showing what was his practice. *Cf. Gillingham*, 27 Cr.App.R. 143.

In none of these cases was there any suggestion that any of these articles had in fact been used for any criminal or immoral purpose and in some of these cases no evidence at all was given that they could be so used.

The proposition that any evidence is admissible which tends to show that an accused person is by reason of his character, habits or general behaviour likely to commit a particular kind of offence and accordingly likely to commit the offence charged as being of that kind is not in apparent accordance with well-established principles. It is better, therefore, to regard the cases which appear to support such a proposition as being in a peculiar class and not to apply those decisions to other cases without very careful consideration.

These cases were reviewed by the C.C.A. in *Lewis Cole*, 28 Cr.App.R., 43, where it was stated that *Thompson's Case*, 13 Cr.App.R. 61, was in accordance with the decision of the House of Lords in *Makin* v. *Att.-Gen. for N.S.W.* [1894] A.C. 57.

The rule as to the admissibility of evidence of other criminal acts may be stated thus:—

> This evidence may be given if it be relevant to an issue raised before the jury and it may be relevant if it bears upon questions whether the acts alleged to constitute the crime

> charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused. *Cole*, 28 Cr.App.R., at p. 48.

See also *Deighton and Thornton* [1954] Crim.L.R. 208, where evidence of a previous acquittal was held to be admissible in order to prove special knowledge.

Evidence to Contradict Witness—It is permissible to suggest to a witness that on some previous occasion he has made a statement inconsistent with his present testimony, and for this purpose a document or part thereof may be shown to him. But his answer is binding unless the document be put in evidence to contradict him, in which case it must be proved. If it is intended to put in a document, the parts to be relied on as contradicting him must first be shown to the witness and he must be told of the circumstances under which the statement was made sufficiently to designate the occasion and he must be asked whether he made such a statement: *Cf.* Criminal Procedure Act (Denman's Act), 1865, s. 5.

Evidence as to Condition of a Chattel—Evidence of witnesses is admissible to prove the condition, etc., of a chattel without production of the chattel: *Hockin* v. *Alquist Bros., Ltd.* [1943] 2 All E.R. 722.

In Rebuttal—After the close of the case for the defence further evidence may not be called either by the prosecution or by the court to rebut the defence, unless a matter arises *ex improviso*, *i.e.*, which no human ingenuity could have foreseen: *Frost* (1840) 4 St.Tr.(N.S.) 85; *Harris*, 20 Cr.App.R. 86; *Day* (1940) 27 Cr.App.R. 168. Alibi is not such a matter: *Liddle*, 21 Cr.App.R. 3.

Accomplice

The evidence of accomplices is admissible for or against accused persons, but even where an accomplice is apparently telling the truth the jury should be warned that it is unsafe to convict on the uncorroborated evidence of such a witness except after a most careful scrutiny of his or her evidence. The evidence of one accomplice cannot be corroborated by that of another: *Noakes* 5 C. & P. 326 approved in *Baskerville* 12 Cr.App.R. 81. What is required is some independent testimony connecting the prisoner with the crime.

It is now a rule of law that a judge must warn a jury as to the danger of convicting upon the uncorrobated evidence of an accomplice. If there is no such warning, the Court of Criminal Appeal will normally quash the conviction unless it can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907: *Davies* v. *D. P. P.* [1954] A.C. 378.

This rule applies to cases of quasi-accomplices, *e.g.*, in sexual cases where the accused person may have persuaded a boy or girl to submit to some act of indecency, and still more strongly where there is full and free consent, and that even although consent does not constitute a defence, as, *e.g.*, where the boy or girl involved is under sixteen years of age.

The rule applies only to witnesses for the prosecution and not to a person tried jointly who gives evidence on his own behalf which happens to incriminate another of the persons jointly charged: *Barnes*, 27 Cr.App.R. 154.

It applies to a person who gives evidence against an accused person of other illegal acts, *e.g.*, as evidence of intent as to which the witness was in the position of an accomplice: *Farid*, 30 Cr.App.R. 168.

It is often difficult to determine whether a person was an accomplice or not, particularly in sexual cases. The following main points should be borne in mind:

In a case where there is some doubt as to the degree of participation of a particular witness in the crime, it is for the jury to decide whether he was in fact an accomplice or not: *Farid*, 30 Cr.App.R. 168.

If the evidence is unsworn the witness must be corroborated.

In assault—Where a person assaulted is over sixteen years of age then if that person be a consenting party to the alleged assault and battery, unless the act is unlawful, it is not an illegal assault, for such an assault must be proved to have been against the will of the person assaulted.

But where the element of consent is material, it is for the jury to determine whether (i) a person was an accomplice or not, and (ii) was consenting to the act fully realising its nature and significance. Where there is not such a realisation, then, even though there may have been " submission," in the sense that a person submitted to the acts without protest, yet there is in law no true consent. A person submitting thus is not an accomplice.

If the jury negative consent, then strictly the question of corroboration does not arise. In spite of this, however, it has been emphatically laid down by the C.C.A., *Cratchley*, 9 Cr.App.R. 232, and *Southern*, 22 Cr.App.R. 6, that " there ought in such cases to be a warning by the judge and it ought to be brought home to the minds of the jury that they must act on evidence of this character with extreme care."

The correct direction therefore is submitted to be:

> If you think that this boy (or girl) was aged sixteen years or more and was consenting to this act, fully realising its nature and significance and being willing to participate in it, then he (or she) would in law be an accomplice, and in that case you ought not to convict unless his (or her) evidence is corroborated in a material particular implicating the accused, *i.e.*, strengthened by some independent evidence tending to show that the accused committed the offence. Even if you think the boy (or girl) was not a consenting party you ought to receive his (or her) evidence with very great caution, for it is known that charges of sexual misconduct are sometimes made by young persons against adults without any or any sufficient foundation.

Corroboration

The unsworn evidence of children *must* be corroborated. The evidence of a woman alleging paternity in affiliation proceedings *must* be corroborated. The evidence of complainants in sexual cases, male or female, *ought* to be corroborated. The evidence of accomplices *ought* to be corroborated.

Corroboration is " That which confirms, strengthens, makes more certain or establishes upon a more firm basis." What is required is evidence which:

1. Strengthens the evidence of the accomplice;
2. comes from an independent source; and
3. implicates the accused in the commission of the offence.

The Children and Young Persons Act, 1933, s. 38, makes the unsworn statement of a child admissible, but provides that no person can be convicted upon it unless it be corroborated by some other material evidence in support thereof implicating the accused.

The unsworn evidence cannot be corroborated by the unsworn evidence of another child but it can be corroborated by the sworn evidence of another child. Whenever a child is called to give evidence, sworn or unsworn, a warning should be given to the jury as to the risk of acting upon it, unless such evidence is corroborated: *Campbell* [1956] 2 Q.B. 432.

The uncorroborated evidence of an accomplice is admissible in law, but it has long been the practice at common law for the judge to warn the jury of the danger of convicting the prisoner upon the uncorroborated evidence of an accomplice or accomplices and, in the discretion of the judge, to advise them not to convict upon such evidence, at the same time pointing out that it is legal for them to convict upon it if they choose. This rule of practice has now become a rule of law: *Davies* v. *D. P. P.* [1954] A.C. 378. Omission of warning generally involves the quashing of a conviction. The need for the warning arises only when the accomplice is called as a witness for the prosecution and not when accomplices are called by the defence or are prisoners tried together with the accused: *Barnes*, 27 Cr.App.R. 154. But if the prosecution relies upon such evidence as corroboration the jury must be warned in the way mentioned.

Corroboration is required of a witness who gives evidence against an accused person of other illegal acts and is in the position of an accomplice: *Farid*, 30 Cr.App.R. 168.

Accomplices cannot corroborate each other.

In all cases where corroboration is essential or desirable, what is required is:

Some independent testimony which affects the accused by tending to connect him with the crime; that is, evidence direct or circumstantial which implicates the accused and which confirms in some material particular not only the evidence given by the accomplice that (a) the crime has been committed, but also that (b) the accused committed it: *Baskerville*, 12 Cr.App.R. 81.

The accused's own admissions or his conduct may afford the necessary corroboration: *Hartley*, 28 Cr.App.R. 15. Not denying a charge at any stage of proceedings is not corroboration. *Keeling*, 28 Cr.App.R. 121. The evidence of one accomplice cannot corroborate that of another accomplice. But the evidence of one accomplice's wife may corroborate the accomplice of her husband: *Willis*, 12 Cr.App.R. 44.

Where two persons are indicted together corroboration as against one of them is not corroboration as against the other.

Evidence of a complaint by a woman or girl in sexual cases made shortly after the occurrence is not corroboration of her story, as it does not emanate from an independent source and because a person cannot corroborate himself or herself. It is, however, admissible in evidence as showing the consistency of the girl's story. Conversely, it weakens the girl's evidence if it is established that she made no, or no prompt, complaint unless there be some good cause for her reticence.

Evidence of a fresh complaint by a male in sexual cases is similarly admissible: *Camelleri*, 16 Cr.App.R. 162; *Wannell*, 17 Cr.App.R. 53.

Where, as in sexual cases, corroboration is required by a rule of practice, medical evidence that a person has been sexually interfered with is to a certain extent corroboration of that person's testimony. But the need for evidence connecting the accused person with the offence remains.

The justification for it probably is that the implication of the accused has to be arrived at by stages and these may be regarded thus:—

1. Is the complainant telling the truth no matter who the wrongdoer was? Is his or her story consistent with itself? Did he or she make an immediate complaint? Was his or her behaviour and demeanour consistent with the truth of the complaint?
2. Does a medical examination reveal that the complainant has been sexually assaulted or interfered with?
3. If there were no immediate complaint, is there a reasonable explanation of its absence?
4. Is there some independent evidence tending to show that the accused was the person who committed the offence?

In *Coulthread's Case*, 24 Cr.App.R. 47, the complainant, a boy scout, had slept in a narrow bed with the accused, a scoutmaster. There was evidence that the complainant had been sexually interfered with and it was held that the accused was properly convicted.

Even where corroboration is merely desirable, though not essential, there must be a clear direction to the jury as to corroboration: *Winfield*, 27 Cr.App.R. 139.

Whether there is corroborative evidence or not is a question of law for the chairman. *Bovy*, 12 Cr.App.R. 15, and in dealing with the question of corroboration, it is the duty of the judge to point out to the jury the evidence which is capable of being regarded as corroboration in law, and it is then for the jury to decide whether or not such evidence does in fact amount to corroboration: *Tragen* [1956] Crim.L.R. 332.

Where corroboration is required by statute and there is no corroborative evidence, it is the duty of the presiding judge or chairman to stop the case at the close of the prosecution and direct the jury to acquit. Where corroboration is not required by statute, the case should be left to the jury with the due caution as to the danger of convicting on uncorroborated evidence: *Baskerville*, 12 Cr.App.R., at p. 88.

Depositions

A deposition may be read as part of the evidence on the trial of a person for an offence for which he was committed, or an offence arising out of the same transaction or set of circumstances as that offence, subject to the following conditions:

1. If the deposition is that of a person whose attendance at the trial has been dispensed with as being unnecessary, or of a person who is dead or insane, or so ill as to be unable to travel, or of a person who is being kept out of the way by or on behalf of the accused, and

2. If it is proved by a certificate, signed by an examining justice, or by the clerk to the examining justices, or by a credible witness on oath, that the accused or his counsel or solicitor had full opportunity of cross-examining the witness, and

3. If it is signed by the justice before whom it purports to have been taken.

Proviso—If the deposition is that of a witness whose attendance has been dispensed with, his deposition may not be read if he has been duly notified that he is required to attend the trial. Criminal Justice Act, 1925, s. 13 (3) and the Magistrates' Courts Act, 1952, s. 5.

Note.—Where an accused person changes his mind and pleads " not guilty " on arraignment the trial should be adjourned and the witnesses (other than purely formal witnesses) given notice to attend: *Collins*, 26 Cr.App.R. 177.

Cross-examination upon—If it is desired to use a deposition to contradict a witness as to what he said before the examining justice, his attention must first be called to those parts of it which are to be used to contradict him and the deposition must be put in as part of the case for the party by or on whose behalf the cross-examination is conducted: Criminal Procedure Act (Denman's Act), 1865, s. 5.

If the very words in the deposition be read to the witness in the hearing of the jury this puts the deposition in evidence. It is obvious that in such an instance the deposition is being used to contradict the witness.

Copies of—An accused person committed for trial is entitled to a copy of the depositions on payment of a reasonable sum, not exceeding 1½d. per ninety words: Section 13 of the Magistrates' Courts Rules, 1952.

Witnesses for the prosecution who are deponents should be tendered so as to give the defence an opportunity to cross-examine, even where they are not called for the prosecution: *Adel, etc.* v. *Att.-Gen. for Palestine* [1944] A.C. 156.

Practice and Procedure

Speeches of Counsel

Right of defending counsel to open his case to the jury before calling evidence

In *R.* v. *Collins*[1] on September 12 at the Central Criminal Court, C. was charged with larceny, breaking out and arson. Immediately before his trial he applied to the judge for, and was granted, legal aid. Thereupon he informed counsel that if B. could be called as a witness, he, C., would be able to establish an alibi. The police offered to search for B., and, if found, to serve a subpoena upon him to attend the trial. At the close of the case for the prosecution B. had not been found. Counsel for the accused intimated that, apart from the possible evidence of B., evidence for the defence would be confined to that of C.: and so far as B. was concerned, it was counsel's intention to call him, if found, only if he considered that B. could assist the court. Diplock J. held that, although counsel's intention to call evidence on the facts other than that of the prisoner was conditional upon the finding of a witness, and, if found, upon that witness's ability to assist the court, counsel nevertheless had the right to open his case to the jury before calling his evidence. [DAVID CALCUTT, *Barrister-at-Law*.]

Summary Justice

Bookmaking

Loitering for the purpose of receiving bets; four men fined £30, £15, £20 and £5 respectively; Rees: Cardiff Magistrates' Court (*The Times*, September 12).

Customs and Excise

Attempting to evade the customs duty on a camera and case, a light meter, a flash gun, five films, a bottle of whisky and fifty cigars: fined £125; Clarke: Southampton Magistrates' Court (*The Daily Telegraph*, October 2).

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[1] For the prosecution: *Alastair Morton* (instructed by the Solicitor to the Metropolitan Police). For the defence: *David Calcutt* (instructed by the court).

False pretences

Obtaining £17 10s. by false pretences by pretending to have installed a new cathode ray tube in a television set; fined £10 and ordered to pay £1 costs; Riley: Bilston Magistrates' Court (*The Birmingham Mail*, August 30).

Obtaining £5 13s. by false pretences by pretending he was a Post Office official and could arrange for the installation of a telephone within a week; fifteen previous convictions; four months imprisonment: Noon; Birmingham Magistrates' Court (*The Birmingham Mail*, September 16).

Malicious damage

Maliciously damaging "a length of rope with flag attached" belonging to the Ministry of Works, the flag, a Hungarian one, was flying in Parliament Square during the Inter-Parliamentary Union Congress: fined £2 and ordered to pay £2 compensation; de Bounevialle; Bow Street Magistrates' Court (*The Times*, October 1).

Pharmacy and medicines

Selling scheduled poisons not by or under the supervision of a registered pharmacist contrary to section 12 of the Pharmacy and Medicines Act, 1941. The woman chemist employed by the defendant firm had a Dublin qualification: fined £3 on each of three summonses and ordered to pay £5 5s. costs; Regal Pharmacy Ltd.; Kingston-on-Thames Magistrates' Court (*The Times*, September 28).

Rent restrictions

Requiring £100 premium as a condition of the grant of a tenancy contrary to section 13 of the Rent Act, 1957; fined £20 and ordered to pay £6 6s. costs to Hackney Borough Council and to repay £100 to the tenant; Darwin: Old Street Magistrates' Court (*The Daily Telegraph*, September 19).

Road traffic

Using a car not equipped with a driving mirror in accordance with reg. 16 of the Motor Vehicles (Construction and Use) Regulations, 1955. The defendant's view through the internal mirror fitted to the car was obscured by a load of wood trellis in the back of the car; discharged on payment of 4s. costs: Sayer: Huddersfield Stipendiary Magistrate (J. R. T. Holt, Solicitor).

Case and Comment

Quarter Sessions—*Appeal against conviction—plea of guilty*

R. *v.* DEPUTY CHAIRMAN OF THE COUNTY OF LONDON QUARTER SESSIONS APPEALS COMMITTEE, *ex p.* BORG (Q.B. Divisional Court: Lord Goddard C.J., Byrne and Devlin JJ.: July 19, 1957) ([1957] 3 W.L.R. 585; [1957] 3 All E.R. 28).

The applicant, who had pleaded guilty to certain summary offences before a metropolitan magistrate and had been sentenced to a fine of £100 and six months' imprisonment, sought an order of mandamus to direct the deputy chairman to hear her appeal against conviction, claiming a right of appeal under section 50 of the Metropolitan Police Act, 1839. It was argued for the applicant that this section had never been repealed expressly or by implication. On behalf of the respondent it was argued (1) that the section never gave a right of appeal against conviction to a defendant who had pleaded guilty; and (2) that a person who had pleaded guilty could not be a person aggrieved by the conviction so as to have a right of appeal against conviction within the section.

Held, accepting both these arguments, the application must fail.

COMMENTARY. Metropolitan Police Courts Act, 1839, s. 50, provides: "In every case of summary order or conviction before any (metropolitan magistrate), in which the sum or penalty adjudged to be paid shall be more than £3, or in which the penalty adjudged shall be imprisonment for any time more than one calendar month, any person who shall think himself aggrieved by the order or conviction may appeal to . . . quarter sessions . . ."

This section, thought by many practitioners to give an anomalous right of appeal against conviction after a plea of guilty, was for long unnoticed both by the High Court (until *Reg.* v. *London Justices, ex p. Greenwich Union* [1900] 1 Q.B. 438) and by the authors of Justices' Manuals (there is no mention of the section in Archbold's *Practice of the Court of Quarter Sessions,* 3rd ed. (1869) or 4th ed. (1885), or in Stone's *Justices' Manual* as late as 1900 (32nd ed.)), although it seems to have been the first statute to give a general right of appeal to quarter sessions, albeit limited to appeals from metropolitan magistrates. Before 1839, there being no common law right of appeal to quarter sessions, the right only existed where provided by the statute creating the offence in question. A more general right of appeal for a defendant who had not pleaded guilty was given by the Summary Jurisdiction Act, 1879, s. 19, and the Criminal Justice Administration Act, 1914, s. 37 (1); and a defendant who had pleaded guilty was given a right of appeal against sentence by the Criminal Justice Act, 1925. The right of appeal to quarter sessions is now governed by the Magistrates' Courts Act, 1952, s. 83. Section 50 of the 1839 Act, however, has never been expressly repealed.

The section was considered in two cases which came before the High Court in 1919. In *Moseley* v. *Director of Public Prosecutions* [1920] 1 K.B. 16 the appellant had pleaded guilty to an indictable offence before a metropolitan police magistrate and had been dealt with summarily under the provisions of the Summary Jurisdiction Act, 1879, and sentenced to six months' imprisonment. Having pleaded guilty, he had no right of appeal under section 19 of that Act, and accordingly sought to appeal under section 50 of the 1839 Act. The court held that the 1839 Act did not apply to indictable offences tried summarily, that the only right of appeal was that given by the 1879 Act, and that consequently the appellant had no right of appeal.

In *Mittleman* v. *Denman* [1920] 1 K.B. 519 the appellants had pleaded guilty before a metropolitan magistrate to summary offences and had been sentenced to three months' imprisonment, and a recommendation for their expulsion as undesirable aliens was made under the Aliens Act, 1905. It was held that the right of appeal given by section 50 of the 1839 Act to a person who has pleaded guilty had not been taken away by the 1879 and 1914 Acts (Darling J. was inclined to think it had: *Moseley* v. *D. P. P., supra,* at p. 25). *Moseley's* case was distinguished on the ground that in that case, where the offence only became triable summarily in virtue of the 1879 Act, the court had applied the principle that where a statute creates the jurisdiction to try an offence and gives a right of appeal from the order made at the trial, it ought to be inferred that the only right of appeal is that which is given by the statute conferring the jurisdiction.

Considering *Mittleman* v. *Denman* in the present case, Lord Goddard C.J. said: ". . . it is obvious that what the court was holding there was that that section gave the court power to consider the sentence—not the conviction—if the defendant had pleaded guilty." After quoting the argument of counsel for the appellant in *Mittleman's* case, who had urged upon the court that if the later Acts had repealed section 50 entirely, it would follow that in many cases a defendant who had pleaded guilty and been sentenced with undue severity would have no right of appeal at all, the learned Lord Chief Justice continued: "I think it is clear when one reads the judgment of the court in that case that the whole point was whether an appeal lay under section 50 so that a person who had been sentenced under section 50 after a plea of guilty could appeal against his sentence. That was all the court was considering there." Byrne J., concurring, said: "I can find nothing in that case to support the contention that it decided that there was a right of appeal against conviction after a plea of guilty."

There are two factors in that case, however, which, it is respectfully submitted, lend slight support to the contention that the court decided that there was a right of appeal against conviction. In allowing the appeal and remitting the case to quarter sessions, the court did not specify whether the appellants had right of appeal against conviction or sentence or both, but the case stated by the quarter sessions concluded: "The question for the court was whether the appellants in these circumstances had the right of appealing against the convictions, sentences and recommendations for expulsion . . ."; and counsel for the appellants began his argument: "The appellants have a right of appeal to quarter sessions against their convictions."

With regard to the second argument of counsel for the respondent, the court held that the proper construction of section 50 is that a person aggrieved by the order may appeal against the order and only a person aggrieved by the conviction may appeal against the conviction also. A person who has deliberately pleaded guilty, it was held, cannot be aggrieved by the conviction. This point was not taken in *Mittleman's* case. Such a person might well be aggrieved by the sentence and would therefore have a right of appeal against sentence, but against that only.

This decision avoids the anomaly of a defendant who pleads guilty before a metropolitan magistrate having a right of appeal to quarter sessions against conviction, while his counterpart before other magistrates has a right of appeal against sentence only. It may be argued that this is a matter for the legislature to correct and not the courts (*cf. Mittleman* v. *Denman, supra, per* Earl of Reading C.J., at p. 528; the anomaly was also noticed in *Cockhill* v. *Davies* [1943] K.B. 508), but it is respectfully submitted that such an anomaly should be avoided unless the courts feel constrained by the words of the Act to give effect to such a result (*cf. Rex* v. *London Quarter Sessions, ex p. Bowes* [1951] 1 K.B. 383, *per* Lord Goddard C.J., at p. 390).

[P. J. Fitzgerald, *Barrister-at-Law*.]

Acts and Orders *

Animals

TUBERCULOSIS (NORTH-WEST ENGLAND ATTESTED AREA); (SOUTHERN ENGLAND ATTESTED AREA); (WALES ATTESTED AREA); AND (NORTH, WEST, CENTRAL, FORTH AND SOUTH-WEST SCOTLAND ATTESTED AREA) ORDERS, 1957 (S.I. Nos. 1612; 1613; 1614; and 1634 respectively): all operative October 1, 1957. Under section 5 of the Diseases of Animals Act, 1950 (14 Geo. 6, c. 36), the Minister of Agriculture, Fisheries and Food (and the Secretary of State in respect of Scottish Areas) may make an Order declaring an area to be an eradication area for purposes connected with the control of any particular disease if he is satisfied that a substantial majority of the cattle therein are free from that disease. For similar purposes he may make an Order declaring an area to be an attested area if he is satisfied that that disease of cattle is, for practical purposes, non-existent therein.

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* Prepared by F. Maurice Drake, Barrister-at-Law.

By previous Orders the areas concerned in these Orders were declared Eradication Areas or Attested Areas; and the present Orders revoke these earlier Orders and declare the whole areas (which are specified in detail in the Schedules to the Orders) to be Attested Areas.

The previous Orders now revoked are as follows: S.I. No. 1612 revokes S.I. 1955 No. 1451 and S.I. 1957 No. 259; S.I. No. 1613 revokes S.I. 1957 No. 258; S.I. 1614 revokes S.I. 1955 No. 1450 and S.I. 1957 No. 257; and S.I. 1634 revokes S.I. 1951 No. 134; S.I. 1955 No. 1445 and S.I. 1957 No. 251.

In each case the new Attested Areas will continue to be subject (as they were under the revoked Orders) to the provisions of the Tuberculosis (Area Eradication) Order, 1950 (S.I. 1950 No. 2006) as amended by S.I. 1954 No. 762 and S.I. 1955 No. 1449; which provisions include, amongst other things, a prohibition against movement of cattle into an eradication area or attested area except under licence or on certain transit journeys.

For penalties for contravention, see section 79 of the Diseases of Animals Act, 1950.

London

London Cab (No. 2) Order, 1957 (S.I. No. 1620): operative September 16, 1957. The scale of fares payable for the hiring of motor cabs in the Metropolitan Police District and the City of London is specified in paragraph 40 of the London Cab Order, 1934 (S.R. & O. 1934 No. 1346) as set out in the London Cab (No. 2) Order, 1951 (S.I. No. 1352); and the fares are required to be automatically recorded by taximeters of approved pattern which are fitted to every cab. This Order permits a surcharge of sixpence on every hiring, in addition to the sum recorded on the taximeter, provided that a notice in the terms specified in the Schedule is prominently displayed in the cab throughout the hiring.

For penalties for contravention, see section 10 of the Metropolitan Public Carriage Act, 1869.

The following Orders have been made detailing prescribed routes: S.I. Nos. 1574 (Lambeth): 1665 (Finsbury). The following Order has been made revoking a previous Order detailing prescribed routes: S.I. No. 1606 (revoking S.I. 1949 No. 2364 detailing prescribed routes in Battersea, Lambeth and Wandsworth).

Merchandise Marks

MERCHANDISE MARKS (IMPORTED GOODS) NO. 4 ORDER, 1930 (PROVISIONAL EXEMPTION) DIRECTION, 1957 (S.I. No. 1641): operative September 17, 1957. The No. 4 Order, 1930 (S.R. & O. 1930, No. 527) as amended by the Order of 1937 (S.R. & O. 1937 No. 720) prohibits the importation or sale in the United Kingdom of refractory bricks, blocks and tiles, other than metallic bricks, blocks and tiles, unless they bear an indication of origin applied to them in the prescribed manner. This Order prescribes alternative methods of applying the indication of origin to refractory bricks, blocks and tiles not made from molten material. Under the Merchandise Marks Act, 1926 (16 & 17 Geo. 5, c. 53), s. 3, this Order will continue in force, unless it is withdrawn by the Board of Trade, until an Order in Council is made amending the original 1930 Order either in accordance with the terms of this Order or in some other manner; or failing any such Order being made, then until September 16, 1958.

For penalties for contravention, see section 5 of the Merchandise Marks Act, 1926.

Rivers

TAY RIVER PURIFICATION BOARD (AREA AND ESTABLISHMENT) ORDER, 1957 (S.I. No. 1621): operative September 19, 1957. An area is defined which is to be known as the Tay River Purification Board Area and a river purification board, to be known as the Tay River Purification Board, is established. The Order specifies the total number of members of the board and the number of members who are to be appointed by the councils of the counties and large burghs whose districts are comprised wholly or partly within the river purification board area. The Order also specifies the period within which an administrative scheme shall, in accordance with the provisions of section 4 of the Rivers (Prevention of Pollution) (Scotland) Act, 1951 (14 & 15 Geo. 6, c. 66), be prepared and submitted to the Secretary of State, and certain modifications in the provisions of the Local Government (Scotland) Act, 1947, applied by the Act. Certain further provisions of the 1947 Act are also applied to the Board, with suitable modifications.

RIVER AXE (PREVENTION OF POLLUTION) (TIDAL WATERS) ORDER, 1957 (S.I. No. 1637): operative September 23, 1957. Under the powers vested in the Minister of Housing and Local Government under sections 6 and 7 of the Rivers (Prevention of Pollution) Act, 1951 (14 & 15 Geo. 6, c. 64), the Minister has ordered that the following sections of that Act shall apply to the tidal waters of the River Axe and of its tributaries as they apply to streams, save that the application of section 2 shall not penalise the continuation of any discharge which is being made into the waters in question at the time the order was made, on September 16, 1957. But this exception will cease to apply if there is any substantial variation in the amount or nature of that discharge:

Section 2 (prohibition on use of stream for disposal of refuse, polluting matter, etc.);
Section 3 (prevention and making good of defaults under section 2);
Section 4 (cleansing bed of stream, cutting vegetation, etc.);
Section 5 (by-laws);
Section 7 (subsections (1) to (15) (restrictions on new outlets and new discharges)).

For penalties for contraventions, see sections 2, 4 and 5 of the Rivers (Prevention of Pollution) Act, 1951.

Road Traffic

MOTOR VEHICLES (DRIVING LICENCES) (AMENDMENT) (NO. 2) REGULATIONS, 1956 (REVOCATION) REGULATIONS, 1957 (S.I. No. 1578): operative October 1, 1957. During the recent period of petrol rationing the principal regulations (S.I. 1950, No. 333) were amended so as to permit the holder of a provisional driving licence in certain circumstances to drive a motor-vehicle whilst unaccompanied by a fully qualified driver. These amending regulations (S.I. 1956 No. 1972; [1957] Crim.L.R. 132) are now revoked, so that the holder of any provisional licence granted on or after October 1, 1957, must be accompanied by a qualified driver when driving a motor-vehicle.

For penalties for contraventions, see section 111 of the Road Traffic Act, 1930.

MOTOR VEHICLES (DRIVING LICENCES) (AMENDMENT) (NO. 3) REGULATIONS, 1957 (S.I. No. 1579): operative October 1, 1957. The principal regulations (S.I. 1950 No. 333) are further amended so as to provide that the requirement that the holder of a provisional licence must be accompanied by a qualified driver when driving a motor-vehicle shall no longer apply when the licence holder is driving an electrically operated goods vehicle of 16 cwt. unladen weight or under which is not constructed or adapted to carry more than one person.

Salmon and Freshwater Fisheries

NORTHUMBERLAND AND TYNESIDE RIVER BOARD AREA (FISHERIES) ORDER, 1957 (S.I. No. 1589): operative September 5, 1957.

Section 11 of the Salmon and Freshwater Fisheries Act, 1923 (13 & 14 Geo. 5, c. 16), is modified, so as to permit, for a period of ten years, subject to any by-law which may be applicable, the use for fishing for salmon and trout in certain parts of the river board area of nets described in the Schedule to the Order and known as "T" nets.

For penalties for contravention, see section 74 of the Act of 1923.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

37. *Absence of defendant from summary trial*

A summons was issued under section 2 of the Food and Drugs Act, 1955, against a first-named defendant who in turn caused a summons to be issued against A under section 113 of the same Act. We act for A.

On the morning of the hearing day, A (owing to the absence of his manager from work) found it difficult to leave his own business to attend court. He was content to have the case dealt with in his absence, pleading not guilty, so that the prosecution must first prove the case against him; he was, of course, fully advised that the likely consequences might be a conviction, which he was prepared to accept.

We immediately notified the justices' clerk of A's intentions in case the court should think he had ignored the summons. We were astounded, however, when the clerk informed us that no doubt the justices would take a very serious view of his non-attendance, that the prosecuting solicitors and the first defendant's solicitors were attending the court, that the justices would no doubt adjourn the case and require our client to attend under threat of a warrant, and might condemn him in the costs of an adjournment.

We pointed out that this was a summary offence and could be dealt with in our client's absence (although the magistrates have a discretion to require his attendance), and it seemed to us that recent Home Office circulars (such as No. 66/1954) seem to indicate that nowadays summary cases should be dealt with expeditiously and facilities should be afforded to defendants to have cases dealt with in their absence. The only person who could be prejudiced by his non-attendance was our client himself and not the prosecution or first defendants.

Our client did not attend and we were later informed by letter that this was exactly the course that the justices took—adjourning the case, expressing their grave dissatisfaction at our client's non-attendance and reserving the question of costs against him.

We feel strongly about the attitude taken by the justices' clerk and subsequently by the court in this matter. We should be pleased to have your views and to know whether you could refer us to any article, or recommendation by any higher authority, in support of our view. [R. R. M.]

ANSWER

No recommendation of a higher authority could affect the discretion which a magistrates' court possesses under section 15 of the Magistrates' Court Act, 1952, either to hear a summary case *ex parte* or to adjourn it or to issue a warrant for the arrest of the defendant. The Home Office circular 66/1954 related to the saving of time of *witnesses* at summary trials of *minor offences* and concluded with the words: " it should be made clear to defendants that the ultimate decision whether they must attend or not rests with the court."

Most courts make a general practice of requiring the attendance of defendants accused of certain classes of offences, unless in a particular case they are satisfied that there is good reason to excuse attendance. The court in question may feel that it is undesirable to deal *ex parte* with an offence which involves, as section 2 of the Food and Drugs Act, 1955, does, a possible punishment of £100 fine and three months' imprisonment. [A. E. J.]

P.S.—For the future see Magistrates' Courts Act, 1957.

38. *Honorary members of a proprietary club*

In this district there is a registered proprietary club which holds dinners and other social functions on its premises. Non-members who attend these functions are proposed as honorary members forty-eight hours before the function occurs. The club applies to the licensing magistrates for a special order of exemption to cover the extension of the sale of intoxicating liquor from 10 p.m. (end of permitted hours in this district). These functions cover such occasions as National Farmers' Union and local sporting clubs' dinners, etc. This is becoming a regular practice.

Do you consider that such functions held under these conditions constitute grounds for alleging that the club is not being conducted in a proper manner?

ANSWER

Section 143 of the Licensing Act, 1953, makes it obligatory for any club occupying premises which are habitually used for supplying intoxicating liquor to members and guests to register with the local licensing justices. The secretary of the club must make a return giving certain information and showing the rules of the club with regard to various matters including the election of honorary and temporary members. Provided that these rules are complied with the club is committing no offence in supplying liquor to these honorary members, but an application to strike the club off the register may be made, under section 144 of the Act by showing, *inter alia,* that " persons are habitually admitted as members without an interval of at least forty-eight hours between nomination and admission." The word " members " in subsection (1) (*g*) of section 144 appears to include all classes of members including temporary or honorary members.

For these reasons it seems clear that the club you refer to is being careful to observe the provisions of the Licensing Act.

It might be possible to allege that the club is not, in all the circumstances, being conducted " in good faith as a club " under the provisions of section 144 (2) of the Act. Under this section the justices would be required to look at the nature and general background of the club before deciding whether to strike it off the register on the grounds that it was not being conducted in " good faith as a club." It would seem very doubtful indeed, on the facts given above, that such an allegation could be substantiated; and the answer to the question really seems to be that the club is being conducted within the bounds of the Licensing Act, 1953. [F. M. D.]

Letters to the Editor

Causation in Homicide—a Medical View

Sir,

I have read with interest the article by Dr. Camps and Dr. Havard " Causation in Homicide—a medical view," (September, 1957, p. 576).

The authors mentioned the case of *Burgess & McKenzie* (1928) 2 D.L.R. 694, and quoted section 258 of the Criminal Code of Canada, 1927. I thought it may be of interest to quote section 197 of the Criminal Code of Canada, 1955, which replaced section 258 as follows:—

> "197. *Death from Treatment of Injury.* Where a person causes to a human being a bodily injury that is of itself of a dangerous nature and from which death results, he causes the death of that human being notwithstanding that the immediate cause of death is proper or improper treatment that is applied in good faith."

It may also be of interest that the case usually referred to in support of this section is *Lyons* (1949) 95 C.C.C. 351. This was a case in which the accused was charged with manslaughter resulting from his dangerous driving. At the trial there was some conflict as to whether the deceased was still alive after having been struck and might have died as a result of injuries sustained while being transported to the hospital. The jury found the accused guilty of manslaughter. On appeal it was held that there was evidence to support that finding and, further, that even in the event of the deceased having died from the acts of other persons reasonably undertaken to relieve from the consequences of the accused's act he would still be liable.

Harrison J. of the Appeal Division, New Brunswick Supreme Court, at p. 354 of the *Lyons* case, after quoting section 258 (old code then in effect) had this to say—"This provision seems to be declaratory of the common law as stated in *R.* v. *Holland* (1841) 2 Mood. & R. 351; 174 E.R. 313, in which case Maule J. had to charge the jury on an indictment for murder. It appeared by the evidence that the deceased had been assaulted and severely cut across the fingers by the accused. He was urged to have a finger amputated but refused. Lockjaw set in and though the finger was amputated it was then too late and the lockjaw ultimately caused death. The surgeon deposed that if the finger had been amputated in the first instance he thought it most probable that the life of the deceased would have been preserved. Maule J., in his charge (p. 352) said, 'that this was no defence, and told the jury that if the prisoner wilfully, and without justifiable cause, inflicted the wound on the party, which wound was ultimately the cause of death, the prisoner was guilty of murder; that for this purpose it made no difference whether the wound was in its own nature instantly mortal, or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment; the real question is, whether in the end the wound inflicted by the prisoner was the cause of death.'"

In revising the code the Legislative Committee took into consideration the decisions of recent cases and as a result section 197 is more grammatically secure and more closely defined.

Yours faithfully,
JAMES A. NESBITT,
(Barrister and Solicitor).

Edmunston, N.B.

Restitution in Criminal Proceedings

Sir,

I see on reading through my article "Restitution in Criminal Proceedings" that there is an obvious but important misprint at [1957] Crim.L.R. 315 in the second line of the second paragraph. This sentence should read "It has been held, etc., . . . court can*not* be enforced, etc., . . ." The word "cannot" appears as "can," which makes nonsense of what follows.

Yours faithfully,
C. HOWARD.

London.

Books and Periodicals

Reviews:

The Sentence on the Guilty. By Claud Mullins. London: Justice of the Peace, Ltd. 1957. 66 and (index) 4 pp. (9s. 6d. net.)

It is becoming a commonplace that the judge's hardest task is to pass sentence; it may indeed be that the mental equipment required to ensure a fair trial is different in kind from that which can pass a wise sentence. The thought is disturbing since the magistrate in England must both judge and sentence, and most criminal offenders encounter the law for the first time in magistrates' courts. A heavy responsibility thus lies on magistrates, and Mr. Mullins's book is welcome since it aims to give constructive advice as to what kinds of sentence magistrates may and what particular sentences they ought to impose.

Mr. Mullins keeps his eye firmly on the object of sentence, the successful reintegration into society of one who, by his own offence, has placed himself temporarily outside it. Prison only as a last resort is the substance of the author's advice, and he reviews with common sense and in plain English the alternatives. Many good points are well made, and in particular he adds his voice to that of the Wolfenden Committee and a recent committee on the alternatives to short-term imprisonment in a plea for time for inquiry. There is an effective quotation from America—" Days, weeks and sometimes months are devoted to the trial; minutes are sometimes given over to the solution of the difficult problem of what to do with the defendant after he has been found guilty." Mr. Mullins urges us to picture the offender not starting his sentence, but emerging from it.

Probation receives favoured treatment, accounting for a third of the chapters, and this proportion prompts the criticism that the book is too short. It is aimed at magistrates, but it seems more like interesting reading for the layman; it is not large enough to develop the detailed treatment which distinguishes the textbook, and in view of Mr. Mullins's authority, an opportunity seems to have slipped by.

But within the limits imposed by this brevity, Mr. Mullins distils his experience into valuable advice; his book, with the regret that there is not more of it, is recommended to both lawyer and layman alike.

C. D. L. C.

The Life of Richard Stafford Cripps. By Colin Cooke. London: Hodder & Stoughton. 1957. 406 and (index) 9 pp. (30s. net.)

This is the political biography of Stafford Cripps. It is unfortunate that it does not deal with the full life of Cripps. Carefully and with much detail it traces the advent of Cripps into politics and his career in that field, but we do not get a picture of the complete man. Little is told us of his life at the Bar and practically nothing of his home life. Certainly here is the teaching of a man who was guided through life by the highest moral principles but there is little to show us how he put those principles into operation at any level lower than that of a

Minister of State. One does not ask for a biography written for the readers of the yellow press but a man of the stature of Sir Stafford Cripps deserves more than a treatment of his political beliefs only. Perhaps such a biography will one day be written.

Although he does not always convince the reader Dr. Cooke does much to explain glaring inconsistencies in the statements of Cripps.

This book must be read by any student of politics.

P. A.

Jones and Buckle—The Civil Practice of the Magistrates' Courts in South Africa. Sixth Edition. By The Hon. Mr. Justice Joseph Herbstein, Peter William Edward Baker, B.A., LL.B., and Samuel Aaron, B.A., LL.B. South Africa: Juta & Co., Ltd. 1957. lxxiii and 838 and (index) 125 pp. (£8 16s. 6d. net.)

The civil jurisdiction of the magistrates' courts in this country is confined to a limited, if heterogeneous, group of matters, of which separation, maintenance and custody proceedings are the most common. In the Union of South Africa, however, where there is no county court as such, the civil jurisdiction of the magistrates' courts is far more extensive than this; it approximates, in fact, to that of our county court. This book, then, is the counterpart to *The County Court Practice*—our Green Book—and by this token alone its importance to the South African practitioner will readily be appreciated by readers in England.

This edition, as in those which have preceded it since the book first appeared in 1918, is in the familiar form of an annotation to the Magistrates' Courts Act and the corresponding Rules of Court, though to term it thus does but scant justice to the erudition and diversity of the notes or to the lavish citation of authority. The notes, which have been rewritten and enlarged in the present edition, are not confined in scope to the *ipsissima verba* of the enactments themselves, but extend to a wide range of matters pertaining to practice and procedure in general: an example of interest, if mild wonderment, to the practitioner in England is to be found at pp. 12 *et seq.*, where there is an authoritative discourse on the question of recusation.

The lay-out of the present edition has been altered in material respects: thus, references to authorities are now set out in footnotes, and the text of the Act and the Rules is printed in a type which differs from that of the notes. These innovations have been introduced to effect continuity of narration and facility of reference, and they are markedly successful in so doing. A further innovation which the reviewer would suggest for future editions, however, is that some indication is given in the text of the Act and the Rules of those words and phrases which have been singled out for comment, for at present appreciable delay is frequently experienced in tracing them: take, for example, the phrase, " stand as the summons," in section 50 (pp. 165–166). The reviewer would also suggest that the footnotes are demarcated by a bolder line.

The present authors are to be congratulated on an impressive edition of a well-established work of authority, and the publishers on a handsome and distinguished-looking book.

JOHN HAYMAN.

Surgery and Crime. By George Sava. London: Faber & Faber. 1957. 283 pp. (15s. net.)

Current pre-occupation with the psychiatric derangements of criminals may cause us to overlook the influence of underlying physical disorders. Many of these such as squints, limps, epilepsy, etc., can be corrected or controlled in early childhood, thereby safeguarding the child from the unhappy experiences which inevitably accompany them. Writing as a plastic surgeon, George Sava tells of ten cases, all but one of facial disfigurement, in which plastic surgery has arrested the development of criminal or anti-social behaviour. In every case the victim of disfigurement was able to achieve a satisfactory resettlement in society, and in most of the cases the development of what the psychiatrists would term over-compensatory aggression would never have occurred if the deformity had been corrected in early childhood. The author hammers this point home with all his undoubted ability for dramatic and compelling narrative, and it is to be hoped that this book, with its considerable popular appeal, will influence some of those ignorant and superstitious families which allow their children to grow up with uncorrected facial deformities.

Perhaps the most important point the author makes is that minor disfigurements, often detectable only by the experienced eye, can produce psychological ills almost as surely as major deformities, and he concludes with a strong plea that a plastic surgeon should be present at the medical and psychological examination of every criminal, and of every young person brought before the courts on account of anti-social behaviour. There are a few inconsequential slips, *e.g.*, a description of a coroner sitting without a jury at an inquest on a traffic accident, but these must not be allowed to detract from the value of a most interesting and readable book.

J. D. J. HAVARD.

No Moaning of the Bar. By Geoffrey Lincoln, Illustrated by John Verney. London: Geoffrey Bles. 1957. 153 pp. (11s. 6d. net.)

Mr. Geoffrey Lincoln has produced an entertaining book on life at the Bar. The truth of much that it contains strikes home but will leave a scar on only the very sensitive.

Some of the chapters of this book have appeared as articles in *Punch* and the flavour of the book is destroyed if it is read in anything but the shortest of snatches.

P. A.

Cockle's Cases and Statutes on Evidence. Ninth edition by G. D. Nokes. London: Sweet and Maxwell, Ltd. 1957. 495 and (index) 16 pp. (42s. net.)

Students of a subject which is part statute and part common law are not often so fortunate as to have all the materials they require for study in a readily accessible form. Those engaged with evidence have long given thanks to Mr. Cockle and his successive editors for this well-nigh unique compendium of cases, statutes and statutory rules concerned with their subject. To several generations of those whose hard fate it has been to attempt to master the rudiments of a body of law prized less for the rather forbidding charm of its content than for its undoubted utility in practice, *Cockle* has been a most effective standby. It must be admitted, however, that its effectiveness has in recent years been progressively sapped by a tendency in its editors to leave the main body of cases unchanged and merely to add (usually as footnotes) those recent cases which could not be ignored. Nothing, or very little, was ever thrown out, so that the reader of the later (and bulkier) editions could be forgiven for supposing that the great majority of the judge-made rules of evidence were ossifying by the time of *Carrington and Payne* and have hardly developed since. In fact, the work badly needed bringing up to date, and although a start was made with the eighth edition, the movement did not go far enough for some reviewers.

Few will accuse Professor Nokes, who is responsible for the ninth edition, of timidity in this matter; he has made alterations which could fairly be called radical. As far as the cases are concerned, thirteen (mostly first-instance rulings dating from the early years of the nineteenth century) have been relegated to footnotes, and four more have been cast out altogether. Five cases decided in the last twenty-five years which had been grudgingly admitted as footnotes in former editions have been promoted to " leading " status, and extracts have been included from twenty-three " new " cases (most but not all decided since the date of the last edition). Moreover, a far greater number of cases than hitherto are referred to in footnotes to the extracts.

One would expect these changes to result in a considerably enlarged book. It is the more pleasant to report, therefore, that this edition is actually smaller than the last. Professor Nokes has (in the opinion of this reviewer, rightly) jettisoned the Synopsis, which was no more than a second, very full table of contents, and not worth the thirty-six pages it occupied in the last edition; and, on the ground that students' text-books on evidence are not hard to come by nowadays, has severely cut down the Introductory Notes to the cases. By these means and by the use of a smaller but more legible type face no less than seventy-two pages have been saved. It is also gratifying to note that the practice, so long persisted in in previous editions, of picking out important words in a judgment in heavy type, has at last been abandoned; that practice often defeated its own ends, since the reader's eye was repelled by the unattractive appearance of the page before him.

The result of Professor Nokes's labours is a slimmer, rejuvenated *Cockle* with, one may prophesy, a new lease of useful life before it.

D. W. ELLIOTT.

The Tichborne Claimant. By Douglas Woodruff. London: Hollis & Carter. 1957. 467 and (index) 11 pp. (30s. net.)

Was the claimant indeed Sir Roger Tichborne, was he Arthur Orton, the butcher from Wapping, or Thomas Castro, the illiterate Australian, or was he perhaps an illegitimate offspring of the Tichborne family? If he was Sir Roger (and the book contains no definite answer to the question of the claimant's identity), was he the victim of a jealous family, loth to part with the estates, of deep-seated Jesuit prejudice, of a miscarriage of justice, or merely of his own inadequate resources to secure and pay for proper legal representation?

Amid such a maze of facts collected from three continents about the lives of very diverse men, interspersed with verbatim records of parts of the two marathon court actions, long quotations from the uncouth "dear mama" letters and much legal and social history, it is surprising, and greatly to the author's credit, that so clear a picture emerges of the claimant's impact on Victorian England. The details, which are all fascinating, fall into place at breakneck speed: the claimant's 27 stone make him eminently caricaturable, and easily recognisable, with the result that he soon has a steady nucleus of followers ready to cry "Bless you Sir Roger" whenever he goes hunting or riding; he collects vast crowds at his meetings held up and down the country where he asks only that justice should be done for the ordinary man, and works local enthusiasms up to their highest pitch with three hisses for any man of particular odium at the moment—it could be Cockburn C.J. or some lesser person; the cost of the civil action by the family to "protect" the estates was £92,000, and necessitated the Tichborne Estates Act, which, besides allowing the trustees to pay their bills, conferred upon Roger Tichborne the singular honour of being declared officially dead by Act of Parliament; to pay for his defence, the claimant sponsored the launching of the Tichborne Bonds—which consisted of a promise to pay the holder £100 within a month of his getting possession of his estates; immediately following the criminal proceedings, and the claimant's conviction, his counsel was disbarred.

Beneath all this extravaganza, the more unbelievable because it is true, the doubts remain. If justice was indeed miscarried we shall never know. But this book is certainly one of the better results of the whole episode.

J. D.

Sabotage is Suspected. By John Baker White. London: Evans Brothers, Ltd. 1957. 224 pp. (16s. net.)

There appears to be no *raison d'être* for this book at all. Mr. White gives accounts of several sabotage incidents, but leaves many of these in the air, with inconclusive evidence and ponderous speculation. Most of the information would be available from current accounts, and no useful purpose is served by writing about exploits of the I.R.A. and the Communist Party. Nothing new is revealed, and despite its subject-matter, the book makes dull reading.

M. S. A.

The Queen's Courts. By Peter Archer. A Pelican Book. ix and 289 pp. (3s. 6d. net.)

The complex network of courts and tribunals in this country, each with its particular jurisdiction, special origins and history, soon engenders ennui in the unenthusiastic student who hoped to understand the system quickly enough to rush through his examinations. This book will not help him. It is written by someone who knows and appreciates the ramifications sufficiently to linger upon questions which interest him, and offer a rather sketchy account at other times. I would not, therefore, recommend this as a textbook, but as a general overall review. It is a discursive contribution to a complicated and fascinating subject. Further, it has the merit of making one long to learn more about some particular facet.

In reading the section dealing with magistrates' courts, I was reminded that no satisfactory method of appointment of lay justices has yet been devised. The matter is all the more pressing when one realises that their clerks, on whom absolute reliance is placed for legal guidance, are not all qualified, but have picked up their knowledge, with the inevitable and unfortunate gaps, in a long term of experience. The description of proceedings on arrears of a wife's maintenance clearly shows the need for the attachment of wages for such court orders.

Sometimes one might wish to quarrel with the author's facts, *e.g.*, police officers appear in uniform in many juvenile courts now. Yet this book is a major contribution to the understanding of an almost incomprehensible field. The interesting comparison with other systems enables one to see how the French *droit administratif* might have been fruitfully studied in this country years ago, and avoided the jungle growth of administrative tribunals which led to the recent report of a Royal Commission. The Soviet denigration of the fundamental Western principle of the political impartiality of the judges is faithfully pointed out. But it is very questionable whether " legal reform is usually itself the work of eminent lawyers." There is at present so little machinery for law reform that it does not merely creak—it cries out to be expanded. Most law reformers are appalled and saddened when they contemplate the innumerable useful suggestions for law reform which accumulate the dust of ages in obscurity.

JEAN GRAHAM HALL.

Case for the Prosecution. By H. G. Castle. London: Naldrett Press, Ltd. 1956. 180 pp. (16s. net.)

Mr. Castle describes various aspects of criminal detection and the work of the C.I.D. of Scotland Yard. The role of forensic science receives considerable emphasis and there are individual chapters on the Flying, Ghost, Fraud and Vice Squads, the Special Branch and liaison with Interpol. The book is factual and exciting though not sensational, reads easily, has good continuity and is well illustrated by recent cases. In these, a methodical description is given of the way in which evidence is built up from the slenderest of clues, and the divergence between actual practice and exaggerated detective fiction becomes especially clear. The book is illustrated by photographs of routine detective work.

M. S. A.

Books Received :

Without My Wig. By G. D. Roberts, Q.C. London. Macmillan & Co. 1957. 280 and (index) 6 pp. (25s. net.)

Medical Jurisprudence and Toxicology. Tenth Edition. By John Glaister. London and Edinburgh: Livingstone. 1957. 667 and (index) 50 pp. (47s. 6d. net.)

Enemies of the State. Notable American Trials. Edited by Francis X. Busch. London: Arco Publications, Ltd. 1957. 299 pp. (30s. net.)

They Escaped the Hangman. Notable American Trials. Edited by Francis X. Busch. London: Arco Publications, Ltd. 1957. 301 pp. (30s. net.)

Prisoners at the Bar. Notable American Trials. Edited by Francis X. Busch. London: Arco Publications, Ltd. 1957. 288 pp. (30s. net.)

Guilty or Not Guilty? Notable American Trials. Edited by Francis X. Busch. London: Arco Publications, Ltd. 1957. 287 pp. (30s. net.)

The Offenders. By Giles Playfair and Derrick Sington. London: Secker & Warburg. 1957. 273 pp. (25s. net.)

The Sexual Offences Act, 1956. By C. Bruce Orr. London: Butterworth & Co. (Publishers), Ltd. 1957. xxiii and 152 and (index) 12 pp. (25s. net.)

The Road Traffic Act, 1956. By Robert Schless. London: Butterworth & Co. (Publishers), Ltd. 1957. xiii and 140 and (index) 13 pp. (25s. 6d.)

Readers' Digest:

Evidence: The Silence of the Accused: 224 *Law Times* 157, 169.

Homicide: Guilty but insane: should there be a right of appeal?: 107 *Law Journal* 611.

Homicide: The Homicide Act, 1957: 65 *Police Review* 648.

Police powers: Powers to Stop, Search and Detain: 65 *Police Review* 684.

Road traffic: Error of judgment, or momentary carelessness, and dangerous, or careless driving: 121 *Justice of the Peace* 591.

THE
CRIMINAL LAW
REVIEW

Editors
JOHN BURKE and PETER ALLSOP, M.A.
Barristers-at-Law

Editorial

The police as prosecutors

At the meeting of the Magistrates' Association on October 17[1] Sir Hartley Shawcross, speaking on behalf of the Bar Council, voiced the objections of the legal profession to prosecutions in summary courts being conducted by police officers. Sir Hartley said that, however honestly, fairly and objectively the police might try to conduct the proceedings, there was a danger that a superintendent or inspector who had been responsible for the decision to prosecute might go a little too far in order to establish that the prosecution was properly brought. The controversy has been going on for some fifty years between the legal profession and the authorities responsible for engaging and paying lawyers to conduct prosecutions. Strictly speaking, a police prosecutor has no right to be heard by the court unless he is the informant and, in any case, a close identification of the police with the prosecution is undesirable, but the very potent theoretical arguments against the present practice have failed to make any real headway on account of the considerable expense which the engagement of solicitors and barristers to conduct prosecutions would involve. Professional advice is, however, taken by the police in all difficult and serious cases.

The problem of police prosecutions is considered by the learned editors of Stone's *Justices' Manual* in connection with the Town Police Clauses Act, 1847. Prosecutions under this Act must be taken before two justices by the party aggrieved or by the local authority of the district in which the offence is committed. In so far as the Act applies to fires, places of public resort or hackney carriages, the local authority may not delegate the power of prosecution to a constable who is not an officer of the authority.

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[1] For report, see *post*, p. 796.

Police prosecutions under section 28 of the Act, which deals with offences relating to obstructions and nuisances in the street, have led to considerable differences of opinion. In *Jobson* v. *Henderson* (1900) 64 J.P. 425 it was held that a superintendent of police was empowered to lay an information under section 28 where the offence had been committed in the view of a constable, though not, apparently, in the view of the superintendent. In an unreported Divisional Court case of 1938, however, a conviction based upon an information laid by a superior officer was quashed (*Savidge* v. *Brierley*).

The editors of Stone's *Justices' Manual* submit, therefore, that a constable in whose view an offence under section 28 is committed is entitled to prosecute but that it is open to doubt whether a superior or other police officer may do so.

Penal reform: a Home Office view

Addressing the Annual Meeting of the Howard League for Penal Reform, Mr. R. A. Butler, the Home Secretary, spoke of his own deep personal interest in penal reform.

With regard to the problem of finding new work for prisoners Mr. Butler said that the Prison Commissioners had appointed Mr. Albert Healey, a former director of Dunlops, as its Industrial Adviser. Mr. Butler and Mr. J. E. S. Simon, Joint Parliamentary Under Secretary of State to the Home Office, were also in consultation with the T.U.C.

On the subject of recruiting and training Prison Officers, the Home Secretary said that although there had been a sudden and marked improvement in recruitment this year " anything up to a thousand " more Prison Officers were needed. Selected Assistant Governors are receiving full courses in social case work in the universities and elsewhere, while all Assistant Governors now have a six months' initial training course in which emphasis will be paid to this aspect of their work. Executive and specialist staffs are taking part in joint " teamwork " courses.

The Prison Commission, in collaboration with the universities, are studying the use of imprisonment by magistrates' courts, the detention of young offenders and preventive detention. Comparison is being made of the results achieved with young offenders by Borstal training and by imprisonment.

Mr. Butler said that he intends, through various contacts, to see that the Howard League's proposal for an Institute of Criminology is seriously considered, not only by the Government, but also by the universities.

It is hoped to extend the Bristol hostel scheme, whereby selected preventive detention prisoners earn their livings in ordinary employment outside the prison, to other types of prisoners serving long sentences.

As to the prisoners who return to prison again after their first sentence, the Home Secretary said that the Prison Commissioners are considering a new system of classification " based on a closer diagnosis of the individual, from which a different pattern both of prisoners and of prisons is likely to emerge. They are consulting prisoners as well as prison officials."

Referring to the problem of providing the courts with adequate information to assist them when sentencing offenders, Mr. Butler mentioned that in many cases where assizes or quarter sessions sit for short periods and at infrequent intervals it is impracticable to remand the offender for further inquiry between conviction and sentence. This raised the question whether there is not room for close collaboration between those responsible for prescribing punishment and those responsible for carrying it out.

The Home Secretary said that it is necessary to prepare prisoners for " what may be a greater shock than coming into prison—the shock of going out." In conclusion he quoted the words of Sir Winston Churchill spoken nearly fifty years ago as expressing the attitude to penal reform today: " a constant heart-searching by all charged with the duty of punishment—a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard college of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it, in the heart of every man."

Time to pay

As the fines imposed for drunkenness by the West London Magistrates' Court seem to have no deterrent value, Mr. E. R. Guest, the magistrate, is refusing to allow time to pay. The power to dispense with immediate payment is a discretionary power under section 63 of the Magistrates' Courts Act, 1952.

Mr. Guest has, in recent months, frequently expressed his views that many of the maximum fines which can be imposed are inadequate as deterrents. In a recent speech to the Magistrates' Association, Mr. J. E. S. Simon, Joint Under Secretary of State for the Home Office, considered this problem. He said that there was no simple solution, because it would not be right to choose an arbitrary date and suggest to Parliament that all maximum fines fixed before that date should be increased by a simple process of multiplication, nor was it necessarily right to make an arbitrary selection of a few offences for which the penalties must clearly be too low. " We are therefore reviewing the offences for which the magistrates' courts may impose small fines so that we may have some idea of the magnitude of the problem and the most equitable way of tackling it."

Judicial appointment

Stephen Alastair Morton, Esq., has been appointed Recorder of the Borough of Devizes.

Subscriptions

To cover the substantial increase in the postal rates the subscription for 1958 to the *Criminal Law Review* has had to be increased from 35s. to 37s. 6d. Single issues purchased through newsagents and bookstalls will continue at 3s. per copy.

Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

Lessons of a Cross-examination

By Henry Palmer

The Cross-examination of Nurse Stronach in R. v. Adams

The art of cross-examination is not one which may be learnt from textbooks. It is an art which can be acquired only by experience and constant practice. However, the aspiring cross-examiner may well profit from a study of some of the many cross-examinations which are to be found in print, even if he is unable to hear the expert in court. Perhaps some of the most widely read cross-examinations of recent months were those of Mr. Geoffrey Lawrence Q.C. defending Dr. John Bodkin Adams at his trial on a charge of murdering Mrs. Morrell which was heard at the Central Criminal Court in March and April, 1957 [1]; and there will be found later in this article extracts from the cross-examination of Nurse Stronach, who was the first of the four nurses called by the prosecution.

There is only one " rule " of cross-examination in the sense that the cross-examiners may be criticised by the court for breach of it. There are, however, a number of " do's " and " don'ts " which could not properly be called rules but which the cross-examiner fails to comply with at his peril. The one rule is, as is well known, that the cross-examiner must put his client's case to the witness under cross-examination where the witness's version of the facts (or his opinion if he be an expert witness) differs from the cross-examiner's case. This, of course, is to give the witness an opportunity of answering, or giving his version, of the facts (or opinions) to be proved in due course by the other side.

Once the cross-examiner has put his client's case to the witness he has fulfilled his task in the sense that neither the court nor counsel on the other side can criticise his professional conduct, nor can it be suggested to his client subsequently that he is giving a new version of events which could have been confirmed or denied by a former witness. It need hardly be said that the way in which the cross-examiner puts his own client's case is one of the vital aspects of cross-examination.

The cross-examiner must always bear in mind that his first object is to establish his own client's case. Where the witness's evidence-in-chief is favourable to, or in accordance with, his case, the cross-examiner may have no questions to ask; at all events he will probably ask as few questions as possible and they will be designed to bring out further facts in support of his own case. Where, however, the witness's evidence is in conflict with his case, the cross-examiner must endeavour to show, either that the witness is unreliable in the matter in question or in some other matter and that his evidence is not, therefore, to be relied on at all, or, by putting further facts to the witness, that the witness's version of the facts as given by him in evidence-in-chief is not the true version.

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[1] [1957] Crim.L.R. 365.

In the case of *R.* v. *Adams* (see summary in [1957] Crim.L.R. 365) it will be remembered that Nurse Stronach gave evidence-in-chief that she had nursed Mrs. Morrell up to eleven days before she died. She said that she gave hypodermic injections of one-quarter grain of morphia each night on Dr. Adams' instructions. Dr. Adams came himself each night at about 11 o'clock and gave a further injection, but she did not know what those injections were because it was Mrs. Morrell's wish that the nurses should not be in the room at the time. The drugs used by the nurses were kept in a drawer in the dining-room. Dr. Adams gave his injections from his bag. By the time Dr. Adams gave his injection Mrs. Morrell would be very dopey and half asleep. The patient was getting weaker in every way during her period of nursing and on her last day there, November 2, Mrs. Morrell was "almost semi-conscious and rambling." She added that she saw no real signs of pain.

Introduction of the Notebooks

The trial of Dr. Adams will be remembered, among other things, for the introduction of new evidence in cross-examination which had the effect of fundamentally altering the nature of the prosecution's case. This new evidence was, of course, the contemporaneous written record made by those nursing Mrs. Morrell immediately before her death on November 13, 1950. This record was contained in a number of notebooks and it was introduced for the first time in the case into the cross-examination of Nurse Stronach with devastating effect. The new material was not, however, introduced as soon as the cross-examination opened but, as the following passage from the beginning of Mr. Lawrence's cross-examination shows, the ground was first carefully prepared. In particular, the witness was guided towards saying that her memory of what happened nearly six years before was not as reliable as the contemporary reports. The cross-examination began in this way:—

Mr. Lawrence: Miss Stronach, how many patients do you think you have attended since Mrs. Morrell died? A. I could not possibly tell you.

Q. A very great many? A. Yes. In private nursing we are in and out constantly.

Q. You have been constantly nursing other patients during the last six or seven years. Is that right? A. Yes.

Q. And from what you told my Lord and the members of the jury this morning, you are relying on your memory of events that happened on one case six or seven years ago? A. Oh yes.

Q. Just tell me a little bit about Mrs. Morrell so far as you were able to know about her case at the time you were there. We have been told that she was 81 when she died. You knew that she was an old lady, did not you? A. Yes.

Q. Did you know that she had suffered from a stroke? A. Oh yes.

Q. Very evident in a paralysis down the left side? A. Yes.

Q. I believe the technical term for that sort of stroke is a cerebral thrombosis, is not it? A. Yes, that is correct.

Q. And she had great variations in her condition, did she not? A. She had.

Q. But all the time, whether there were these ups and downs, all the time she was going downhill, was she not? A. Steadily.

Q. At the end she was, as you have said, very, very weak? A. Extremely weak.

Q. And from time to time she had attacks of great irritability, did she not? A. Due to her condition.

Q. And that irritability was shown against the nurses, was it? A. Yes. Not only nurses; other people.

Q. And it was a quite irrational irritability, was it not? A. It was not a normal irritability.

Q. When you said " due to her condition " you mean due to the injury to the arteries of the brain? A. Not only that.

Q. Well, that for a start? A. Yes.

Q. What else? A. I should say that it was due a great deal to the amount of drugs she was having.

Q. Yes, I thought you were going to say that. . . . Tell me, after all these years, when were you first asked to remember about Mrs. Morrell's case by anybody? A. About the beginning of September, so far as I can tell you.

Q. Of last year? A. Yes.

Q. That would be September, 1956, very nearly six years after you had last attended her? A. Yes, that is so.

Q. Were you seen again on later occasions by a police officer? A. Yes.

Q. How many times? A. I did not keep account, but several times.

[Mr. Lawrence then put various questions about police and other persons interviewing the witness and continued:—]

Q. So that between September and early January you had been interviewed by three police officers; is that right? A. Yes.

Q. Did you make a statement on each occasion? A. Except the last one.

Q. Have you talked about this case to the other nurses—Nurse Randall and Mason-Ellis and Bartlett? A. Well, we naturally conversed together.

Q. When I say "discussed the case with her" do not think I am criticising you at all; I only want to know what happened. A. Yes.

Q. Do you mean before you gave your evidence at Eastbourne? A. Yes.

Q. And since? A. No. We want to try and forget it.

Q. Yes, I can understand that. Now just a word or two about what you said, so that I can understand it. You say that you used to give Mrs. Morrell an injection of a quarter-grain of morphia? A. Yes, I did say so.

Q. On Dr. Adams's instructions? A. Yes.

Q. Are you referring to your period of day duty or night duty, when you say that? A. Well, night duty.

Q. Did you ever give her anything else by way of an injection? A. No, I did not.

Q. No heroin? A. No.

Q. No Omnopon? A. No, not with me.

Q. And I understand from what you said that the doctor came in the evening after you had come on duty—that is your spell of night duty—and, you say, gave a further injection? A. That is so.

Q. And that is what you still say? A. I do.

Q. I am reminded of something that Miss Mason-Ellis said; I just want to ask you about it. When she gave her evidence at Eastbourne: "I knew what I was injecting but I cannot accurately remember now but whatever I gave was booked in a book and passed on to the next nurse"? A. Yes, that was quite correct.

Q. That is quite correct? A. We wrote down every injection we gave.

Q. You put down—— A. Yes, we kept a report of every injection we gave: this is a usual thing when you are nursing, to keep a report of the injections you give.

Q. It is a usual thing? A. Yes, it is the proper thing to do.

Q. Well, all experienced and trained nurses do it, do they not? A. Yes, they do.

Q. And that is what you did? A. Yes, indeed we did.

Q. All of you nurses did? A. Yes, we all did.

Q. Was that done after each spell of duty, then, or during the night, or what? A. Every time we gave an injection we wrote it down in the book; what the injection was, and the time, and signed our name.

Q. And whatever you wrote in that book would be accurate, would it not? A. Oh yes.

Q. Because it was done right at that very moment? A. Yes.

Q. In the case of these books, I suppose everything that happened of significance in the patient's illness would also go down in the book by the nurse? A. Yes.

Q. Not only injections, I suppose, but medicines and all that sort of thing? A. Yes, that is so.

Q. Doctor's visits? A. Well, we would just put down that the doctor visited and the time, usually.

Q. And, as distinct from memory six years later, of course, these reports would be absolutely accurate, would they not— I mean yours would, at any rate? A. Oh yes, they would be accurate for each one of us.

Q. So that if only we had got those reports now we could see the truth of exactly what happened night by night and day by day that you were there, could we not? A. Yes, but you have our word for it.

Q. I want you to look at that book please. [same handed] Would you look at the day report for the 4th June, 1950?

. . . . .

Q. There is no doubt about it, is there, Miss Stronach, that is the very book of daily and nightly records kept by nurses when you started your first spell of duty in June, 1950? A. Yes, that is so.

The above passage shows that, although the cross-examiner possessed material capable of destroying a great deal of the witness's evidence, the effect of such material could be made the stronger by the witness's own answers to preliminary questions. Mr. Lawrence had shown at this stage—out of the witness's own mouth—that the contemporary nursing records were of virtually unimpeachable accuracy. He was about to show that much of the witness's memory of events was inaccurate, or in other words he was about to "break down" the witness's evidence, and before doing that the witness was led to emphasise the parts of her evidence which would now be shown inaccurate. When, therefore, the evidence was shown to be based upon faulty recollection, Mr. Lawrence was in a position to argue that the witness's entire evidence, so far as it depended upon her memory, should be disregarded.

The doctor's visits and morphine injections

After Nurse Stronach had identified the other notebooks and her writing and signatures, Mr. Lawrence put to her various entries from the books covering the period June 4 to June 25, 1950. This was Nurse Stronach's first spell of duty when she was on night duty. None of the entries disclosed a visit by the doctor in the evening nor any injection of morphia given by her as described by the witness previously. Mr. Lawrence consolidated the position by means of the following questions:—

> Mr. Lawrence: Now, that is the last night that you did duty on that spell, is not it? If you look ahead you will see, will you not, on the next night Nurse Randall was back again? A. Yes.
>
> Q. And you never recorded a visit of the doctor in the evening when you were on duty, did you? A. No, I did not record it.
>
> Q. You are not saying, Miss Stronach, are you, that if you, as a trained nurse of years of experience, had given an injection of a quarter-grain in that spell of duty you would not have put it down in the book? A. No. I should most certainly have put it down.
>
> Q. As such a trained nurse, you would not have omitted to record the visit by the doctor and an injection given by him if in fact it had taken place while you were on duty, would you? A. No, I do not think I would have done.

Nurse Stronach had said, it will be remembered, that she had never given Mrs. Morrell any injection except morphia. The nursing report for the witness's second spell of duty disclosed that she had in fact given injections of another drug, Omnopon. The following were the questions and answers relating to the first occasion when such an injection had been given:—

Mr. Lawrence: Now let us go on to the next period when you came back. You will find that in the third book I have handed to you, and I think you will find it begins on 12th October. Would you look at the day report? And your first entry on that day is 4 p.m. A. It is.

Q. Now, here you are not on night duty but on day duty and this is only a month before Mrs. Morrell died, is it not? A. Yes.

Q. When you went back in October there was a very big difference in Mrs. Morrell's condition, was there not? A. Yes.

Q. She had deteriorated very, very much, had she not? A. Oh yes.

Q. We have seen already your entries for the nights in June. Now let us see what you put in the day only a month before she died: "4 p.m. Asked for bedpan. Same not used. Position changed. Patient became restless and picking bedclothes." Do you see what follows? Is this in your writing: "Hypo injection omnopon $\frac{2}{3}$rd given at 4.30 p.m." A. Yes.

Q. That means that you gave that injection, does it not? A. It does.

Q. And it is an injection of omnopon? A. Yes.

Q. Now, Miss Stronach, do not think that I am blaming you in any way or criticising you for this— A. No.

Q. —but do you remember telling me earlier this morning before you saw these contemporary records that you had never given Mrs. Morrell any injection except morphia? A. Well, I believed that to be true.

Q. Well, this entry shows that your memory was playing you a trick, does it not? A. Apparently so.

Q. Obviously so. Miss Stronach, may I ask you to face this squarely. Obviously your memory played you a trick, did it not, when you said you had never injected anything but morphia? A. Yes. Of course, you have got to remember it is a long time ago for us to remember these things.

Q. That is exactly what I was suggesting to you, that it was a long time ago and that mistakes of memory can be made. This is one of them, is it not, because this is quite clear, is it not: you would not have entered in the report, this day report, an injection of two-thirds omnopon by hypodermic at 4.30 p.m. unless you had in fact given it? A. No, I certainly would not have.

Although the witness had said earlier that Dr. Adams called every evening at about 11 o'clock and that she (the witness) did not know the nature of the injection given to Mrs. Morrell by him, the nursing reports showed that Dr. Adams had made only two evening calls and that in each case the nature of the injection had been recorded. The following is part of the cross-examination about this:—

Mr. Lawrence: Now will you pay close attention to what follows in your writing on 12th October: "7.30 p.m. Visited by Dr. Adams. Hypodermic injection morphia gr. $\frac{1}{4}$, heroin gr. $\frac{1}{4}$, omnopon gr. $\frac{1}{3}$." Is it there in your writing? A. It is.

Q. You have there recorded the exact nature and the exact quantities for the injection which was given to Mrs. Morrell when the doctor visited, have you not? A. Yes, I have.

Q. Otherwise you would not have recorded it? A. No.

Q. And you wind up by saying at the end "General condition very low." That was true, was it not? A. Oh yes.

Q. Only a month before she died. Now, I think we shall find that after doing that part of the day—Are you not feeling well? A. It is all right. It is all right, thank you. Thank you very much.

Q. After doing that part of the day duty, I want a little further help from you in the book because I think you then turn to night duty? A. Oh yes, on the 14th.

Q. Well, so be it. Then we come to the night report of 14th October? A. Yes.

Q. Is that in your writing? A. Yes.

Q. Your first night report then is for the 14th/15th, beginning 10.20 p.m. "Hypo: Inj: Morphia Gr. $\frac{1}{4}$, Heroin Gr. $\frac{1}{3}$ and Omnopon Gr. $\frac{1}{3}$ given by Dr. Adams." You see that? A. Yes.

Q. That means at least two things. It means you recorded a visit of the doctor at 10.20 p.m. doesn't it? A. Yes.

Q. And it means you recorded again the nature and quantities of the injection which was given by him in the book? A. Yes.

Q. That is exactly the same in nature and quantity as the one which you had previously recorded on your half day duty on the 12th October, one-quarter Morphia, one-third Heroin and one-third Omnopon. Exactly the same isn't it? A. Yes.

Mr. Lawrence then continued by taking the witness through the whole of her reports of the nursing of Mrs. Morrell. The position finally reached is shown by the following questions and answers:—

Mr. Lawrence: Now we have been through, Miss Stronach, the whole, I think, of your records made at the time, night after night, or day after day, of your nursing duties for Mrs. Morrell, have not we? A. Yes.

Q. We have not found a single instance where you gave a hypodermic injection of a quarter of a grain of morphia by itself, have we? A. No. Seemingly not.

Q. And I think it is only one or two occasions where you record an evening visit of the doctor, and we find that you record exactly what the injection was that was given, do not we? A. Yes.

Q. You were no less conscientious, were you, in your duties in every way in Mrs. Morrell's case than you would be in any other case of your many years' experience? A. That is so.

Mrs. Morrell's condition

Dealing with Nurse Stronach's evidence-in-chief that Mrs. Morrell was " almost semi-conscious and rambling " on November 2, the cross-examination was as follows:—

Mr. Lawrence:—[You said this morning] that on your very last day she [Mrs. Morrell] was in a semi-conscious condition and rambling. Do you remember saying that? A. I do.

Q. I have drawn your attention to what you recorded on your last day: " Mrs. Morrell has had a much better day on the whole. Has been more awake and taking interest in things "? A. That is quite possible.

Q. That is not the picture of a semi-conscious woman, is it? A. That was the day before. I wrote no report for November the 2nd.

Q. What? Well, if you are going to say that, are you trying to be as fair-minded as you can on this? A. Certainly. What I am trying to point out to you, sir, is that a patient can change very quickly.

Q. Yes, I agree, and that was one of the features of Mrs. Morrell's condition, was not it? A. She most certainly was very different on the day that I left, on November the 2nd.

Q. Well, what do you say? What happened on the morning of that last day and what was she like? A. Well, to me, during the morning it can only—it is possible for it only to last temporarily:—she was to me only semi-conscious during that morning and she rambled; but as to what she was during the rest of the day I cannot tell you.

Q. If in fact she was semi-conscious and rambling, that is a condition which you as a trained nurse would put in the book if you had been responsible for making the entries, would not you? A. If I had been writing the report.

Q. Well, just open that book, please, if you will, at the 2nd November, 1950, and see what Nurse Mason-Ellis said. There is no question about Miss Mason-Ellis being a trained nurse, is there? A. None whatever.

Q. "Day report. 10.30 a.m. Seen with Dr. Bodkin Adams. Drops put in eyes. No injection given. 10.50" twenty minutes later, "Passed urine well." Then ten minutes later, at eleven o'clock. Just follow this, please, Miss Stronach: "11 a.m. Hot milk with soda water and brandy." Then see what this semi-conscious woman, this semi-conscious rambling woman, is recorded by the experienced Sister Mason-Ellis as having had for lunch at one o'clock on the day you left. Can you read it? A. Yes.

Q. What does it say? Read it to the jury, will you? A. It says she had partridge, celery, pudding, brandy and soda. But, of course, I must add that would only be very, very small quantities that she would be given; she would not have much of anything.

Q. What is the object of adding that? A. To let you see that she does not eat a great deal. She would not be eating a lot.

Q. Did you think I had suggested that she had eaten an enormous meal of partridge and celery? A. I couldn't say.

Q. Miss Stronach, how many times did you say you had been interviewed by police officers before you went into the witness-box at Eastbourne? A. Three or four times, I think.

Q. How long did those interviews last? A. Oh, sometimes two hours.

Q. How many hours do you think you spent in the company of police officers at these interviews before you ever gave your evidence to begin with? A. I do not know. I haven't thought about it.

Q. Well, try and think about it now? A. It might be about six hours altogether, I suppose.

Q. Let me go back to what I was saying. Do you observe that your colleague Sister Mason-Ellis recorded that this semi-conscious woman ate, if you like, for lunch that day a small quantity of partridge, a small quantity of celery, a small quantity of pudding and a small quantity of brandy and soda? Do you see that? A. Yes.

Q. You have the greatest respect, have not you, for Sister Mason-Ellis's ability and conscientiousness as a trained nurse? A. I certainly have.

Q. She would not be likely to put anything down if it was not right, would she— A. Actually she has not put down this. It seems to me that I have written it down until a quarter to two, and she came on at 2.30 apparently.

Q. You have written it? You have recorded the lunch of the partridge and celery and the pudding? A. Yes.

Q. Miss Stronach, let us face this: it is another complete trick of your memory to say that on the last day when you left Mrs. Morrell was either semi-conscious or rambling, is not it, now you see what you wrote at the time? (*a pause*). Is not it? A. I have nothing to say.

Q. What? A. I have nothing to say.

Q. You have nothing to say? A. No.

Q. If you have got nothing to say, just turn back the page and see if you can recognise Miss Randall's writing, the previous night nurse. Is that Miss Randall's writing? A. Yes, it is.

Q. Now, before you came on duty on the morning of the 2nd November you would have read what Miss Randall had recorded the night before, would not you, in the usual routine way? A. Yes.

Q. Do you see what Miss Randall recorded the old lady had had for breakfast before you came on duty that last day? A. Yes.

Q. Just read it to my Lord and the jury, will you please, so that they can hear? A. " Boiled egg, bread and butter, bramble jelly, 2 cups of tea."

Q. " Boiled egg, bread and butter, bramble jelly, 2 cups of tea," for breakfast, followed by partridge, celery and pudding for lunch. Just look a little before the breakfast, will you? Do you see that Nurse Randall has written—and what you must have read—" Slept from 11.20 p.m. until 6.45. Eased on to back during night. Seems very bright and not confused "? Do you see that? A. Yes.

Q. Now, would you just look at me, Miss Stronach, please, and listen carefully to this question. Having refreshed your memory from records made by you and your colleagues at the time, it was obviously quite inaccurate to say that Mrs. Morrell was semi-conscious and rambling on the day you left, was not it? A. Well, I have always believed that she was as far as my memory was concerned.

Q. Maybe, but in fact, having looked at those notes written down six years ago, with no memory at all, it is quite clear that it was wrong to say that she was semi-conscious and rambling, is not it? A. Apparently so.

Mr. Lawrence concluded his cross-examination by dealing with the witness's earlier evidence that at the time when Dr. Adams gave Mrs. Morrell his injection the patient was very dopey and half asleep. This was, said the nurse, because Mrs. Morrell had already been given an injection which had made her dopey. The nursing reports, as will be seen from the following cross-examination, did not support this evidence:—

Mr. Lawrence: I must ask you to forgive me, because it is of such a vitally important matter, for asking you about something else you said. Do you remember, relying on your memory, saying that the doctor usually came in about 11 o'clock p.m.? That is when you allege that he had given the injection about which he had not told you? A. I did. Coming about then.

Q. And on those occasions you said she was very dopey and half asleep because you had already given her an injection which had made her dopey; do you remember that? A. Yes.

Q. All that, of course, now turns out to be quite inaccurate on these records, does it not? A. Well, since the day nurse had previously given her the injection she would be dopey.

Q. Your evidence is that you gave the injection? A. Yes, so I understood but I can see now that I did not do so.

Q. So that was quite wrong. And when you say that the doctor gave the injections, we have already had this, that on one or two occasions that you recorded his visit you recorded the actual amount and quality of his injection; we have got that; what I want to ask you about is this: you told the members of the jury at the trial of Dr. Adams for murdering Mrs. Morrell that after those injections given by him she was very dopey and half asleep. Now will you be good enough to turn to your own record of 14th and 15th October, the night report when you were the nurse on duty. It is in the last book. Have you found it? A. Yes.

Q. This is one of those rare instances where you record the doctor as having visited and having given an injection. At 10.20 p.m. you record the visit of the doctor and you record the actual injection given: $\frac{1}{4}$ grain morphia, $\frac{1}{3}$ grain heroin and $\frac{1}{3}$ grain omnopon, you see? A. Yes.

Q. After which there was no question of her being at all dopey, was there? A. She was talking a lot.

Q. But look at it: "Patient continued talking, asking for drinks after well past midnight." That is to say, for more than an hour and twenty minutes after the injection she was not dopey but she was talking and asking for drinks; is that right? A. Yes, but it would not be normal talking, you must understand, in that condition.

Q. Nobody has suggested before, Miss Stronach, that this old lady on 14th and 15th October, aged 81 and within a few days of her death, having had a stroke and all the rest of it, was normal. You have not understood that, have you? A. Quite.

Q. And later on in the night she is talking incessantly? A. Yes.

Q. Now, you read, before you came on duty that night, the day report of the day before, did you not? A. Yes, by Miss Mason.

Q. By Miss Mason. You see this in the middle of that report that the doctor visited between 7 p.m. and 8 p.m. and gave the patient the evening injection. Do you see your experienced colleague has put that down? A. Yes.

Q. And at 7.20 p.m. she has recorded his actual visit. A. Yes.

Q. And recorded the actual injection, just as you did? A. Yes.

Q. A $\frac{1}{4}$ gr. of morphia, $\frac{1}{3}$ heroin and $\frac{1}{3}$ omnopon; you see that? A. Yes I do.

Q. Just exactly the same quantity of those drugs in combination as was given at 10.20 p.m. when the doctor visited again, when you were on duty? A. Yes, she received the first one at 20 past 7.

Q. Yes, and do you see after that Nurse Mason has recorded at 8.30 p.m., an hour and ten minutes afterwards, that she has been dozing lightly since? Not dopey, dozing lightly? Do you see that? A. Yes.

Q. And you found that she was talking so incessantly that during the night at 4.15 in the morning, you yourself gave her another $\frac{2}{3}$ of omnopon in a hypodermic injection, did you not? A. I did.

* * * *

Mr. Justice Devlin, summing-up to the jury, had little to say of Nurse Stronach's original version of events; and his direction upon the quantity of drugs administered was as follows: "I must direct you that there is no evidence upon which you can come to the conclusion that any drugs were administered to Mrs. Morrell over and above the injections recorded in the nurses' notebook. If, therefore, the case for the prosecution had rested solely on the prescription list and the suggestion that the quantities shown had been administered to Mrs. Morrell I should not have allowed the case to go to you at all."

Compensation in Criminal Proceedings

By C. Howard, LL.M.

(*continued from page* 740)

Larceny Act, 1861, s. 106

This section provides that where any sum of money is " forfeited " on summary conviction " for the value of any property stolen or taken, or for the amount of any injury done," it is to be paid to the party aggrieved if he is known. If he is not known it is to be applied as a penalty.[39] There is a proviso that the party aggrieved shall not recover more than his loss where there are several parties to the offence and each is sentenced to pay the sum in question. The sections of the Act to which this one applies [40] all enable a magistrate to sentence the offender to pay the value of the property taken or the amount of the injury to it. By virtue of section 106 these sums must be paid to the party aggrieved. It is noticeable that sums so ordered to be paid may be imposed in addition to a fine but not in addition to imprisonment.

Malicious Damage Act, 1861, s. 64

This section is almost identical with the preceding one and to exactly the same effect.[41]

Criminal Justice Administration Act, 1914, s. 14

This section, which applies only to courts of summary jurisdiction, creates two offences of malicious damage to property where the damage done does not exceed £20 in value. No distinction is made between felony and misdemeanour. Upon conviction under the section the court may order the offender to pay to the party aggrieved such compensation as appears to it to be reasonable. The compensation which can be awarded is necessarily limited since, *ex hypothesi*, the damage will not exceed £20. Any such award is additional to the punishment imposed for the offence. Within its narrow limits this is no doubt a section which magistrates find useful. By its inconsequential isolation, however, it illustrates only too well the haphazard state of the law.

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[39] *i.e.,* in accordance with Magistrates' Courts Act, 1952, ss. 114 and 126 (3).

[40] These are: 18 (stealing dogs); 21 (stealing domestic animals); 22 (possession of stolen domestic animals); 23 (killing pigeons); 24 (taking fish); 33 (stealing trees and shrubs); 34 (stealing fences); 35 (suspicious possession of wood); 36 (stealing or damaging fruit or vegetables); 37 (stealing more vegetables).

[41] The sections of the M. D. A. to which it applies are: 22 (damaging trees); 23 (destroying fruit or vegetables in a garden); 24 (doing the same thing anywhere else); 25 (destroying fences); 41 (killing or maiming animals other than cattle).

Pawnbrokers Act, 1872, s. 33

This section, which, by section 10 of the Act applies only where a loan not exceeding £10 is in question, makes it a criminal offence unlawfully to pawn another's property. On conviction the offender may be sentenced to " forfeit " any sum not exceeding £5 plus any sum not exceeding the full value of the pledge. By the Justices of the Peace Act, 1949, s. 27, and the Magistrates' Courts Act, 1952, s. 114, part of sums so forfeited may be used in compensation. It was decided in *Pickford* v. *Corsi*[42] that the fact that an offender has been convicted of larceny does not prevent further criminal proceedings being taken against him under this section. To the objection that this was to convict a man twice for the same misdeed, Lord Alverstone C.J. replied[43] by distinguishing between " cases in which the same facts and evidence go to establish the same offence, and cases in which they establish different offences of different degree." Whatever may be thought of this as a matter of criminal law, it means in the present context that compensation by prosecution under section 33 may be resorted to if some other attempt fails. For example, in *Bjorkman*[44] an unsuccessful application under the Forfeiture Act, 1870, s. 4, was followed by proceedings under this section. This manoeuvre appears to have been successful.[45]

Riot (Damages) Act, 1886

The Riot (Damages) Act, 1886, describes itself as " An Act to provide Compensation for Losses by Riots." It provides the only extant example of a complete statute being devoted to compensation for loss resulting from a crime as such. Its underlying philosophy seems to be that if damage is caused by riot the fault is peculiarly that of the police, and ought therefore to be repaired out of police funds. The Act provides that where damage has been caused to property or premises by rioters, without fault on the part of the claimant, compensation may be claimed from the local police authority. If satisfactory compensation is not forthcoming, an action founded on the Act may be brought against the authority. Strictly speaking, this statute does not concern itself with compensation *in criminal proceedings*, but the remedy provided, based as it is upon the fact of a crime having been committed, is so closely allied to the other statutory provisions here considered as to merit inclusion in this article notwithstanding the technical distinction.

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[42] [1901] 2 K.B. 212.

[43] [[1901] 2 K.B. 212, 214.

[44] (1937) 1 *Journal of Criminal Law* 10.

[45] 1 *Journal of Criminal Law* 180.

Premises and property

The Act refers [46] to " a house, shop, or building " and " the property therein." The premises specified include [47] " any premises appurtenant to the same." A garage, for example, is either a building or appurtenant to one, and therefore within the Act.[48] The premises must be situated within a " police district," a term which means in effect any place that has a police force.[49] It has been held to cover ground under the control of the military [50] and private ground.[51] There is indeed no reason at all why the action should be confined to riots occurring on public ground.[52]

Applicant

Persons who have sustained loss in the past have been held to include a reversioner, for the injury to his reversion,[53] trustees, for the damage to the property in trust,[54] and one of several joint lessees, without the others being joined.[55] As to this old law, it may be observed that there is nothing in the Act limiting claims to interests in possession or requiring joinder of all interested parties in a single claim. The trustee case is in accord with principle. Section 7 of the Act specifies the correct plaintiffs where churches, chapels, schools, hospitals or public buildings are concerned.

Precautions and provocation

In fixing the amount of compensation particular attention must be paid to the questions whether the claimant himself was a party to the riot, took precautions against it, or offered any provocation to the rioters.[56]

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[46] s. 2 (1).

[47] s. 9.

[48] *Jarvis* v. *Surrey C. C.* [1925] 1 K.B. 554.

[49] The areas within the term are listed in the First Schedule.

[50] *Pitchers* v. *Surrey C. C.* [1923] 2 K.B. 57; *Jarvis* v. *Surrey C. C.* [1925] 1 K.B. 554.

[51] *Munday* v. *Met. Police District Receiver* [1949] 1 All E.R. 337.

[52] *Gunter* v. *Met. Police District Receiver* (1888) 53 J.P. 250; 5 T.L.R. 59. This point of view came in particularly useful after the first world war when the demobilisation riots were taking place. See the cases in footnote 50, where Canadian troops were involved.

[53] *Pellew* v. *Wonford* (1829) 2 B. & C. 134.

[54] *Pritchit* v. *Waldron* (1792) 5 Term Rep. 14.

[55] *Lowe* v. *Broxtowe* (1832) 3 B. & A. 550.

In *Pitchers* v. *Surrey C.C.*[57] the property looted was a shop in an army camp. The proprietress, who was claiming, used to leave it each evening to return home, so that at night the shop was left empty. A riot during which it was broken into took place one evening in the owner's absence. The point was raised in opposition to the claim that the property had been left unprotected. Swift J. held that, since the lady could hardly be expected to take the stock-in-trade home with her each evening, she could not be said to have neglected any precaution merely by leaving the premises empty out of business hours. The learned judge was also impressed by the consideration that the presence of one or two civilians would have been very unlikely to deter the rioters. These views were upheld by the Court of Appeal. The case seems to establish the proposition that whether adequate precautions have been taken is a question to be answered in the light of all the surrounding circumstances. What is appropriate to a safe deposit is not exacted for a lock-up shop; the difference between ten rioters and one hundred is not to be overlooked.

Provocation was considered in *Gunter* v. *Met. Police District Receiver*,[58] apparently the first case under the Act. The rioters were spectators assembled to watch an athletics race. The race did not take place, and the would-be onlookers demanded their money back. This was refused without any explanation of why the race had been cancelled. Instantly there was a riot giving rise to damage for which the promoter made a claim under the Act. He failed on the ground that the refusal to give an explanation amounted in the circumstances to provocation of the spectators. Clearly there can be provocation of an incensed crowd of sportsmen by behaviour which falls far short of incitement to riot. It is heartening to find the subject of provocation to have been treated with something less than the idealism which usually reigns in our criminal law. Questions such as the contractual rights of the parties, or what a crowd of reasonable rioters might do, are properly relegated to a subordinate position.

The Loss

The Act expressly provides in section 2 (2) for the case where the applicant has already been reimbursed for his loss. An insurer who has indemnified the claimant is subrogated to his claim, a provision which seems to add nothing to the general law. Similarly, anyone other than an insurer who has reimbursed the party damaged is also subrogated to his claim.[59] The amount of any compensation awarded is to be reduced to the extent that the claimant has already been indemnified elsewhere. If such independent reimbursement is made otherwise than in cash (for example, if an insurer pays the repair bills but gives no money direct to the claimant), these rules apply as if it had been made in cash.[60]

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[56] s. 2 (1).

[57] [1923] 2 K.B. 57.

[58] (1888) 53 J.P. 250; 5 T.L.R. 59.

The Award

In *Newcastle* v. *Broxtowe* (1832) 4 B. & A. 273 it was said that the appropriate amount of compensation [61] was the sum necessary to restore the property to the state in which it was before the damage, so far as this was reasonably practicable.[62] It is to be noticed, however, that that case was decided under 7 & 8 Geo. 4, c. 31, since repealed, in which the formula was "full compensation." The present statute speaks in section 3 (1) of the authority's fixing "such compensation as appears to them just." Now, in *Newcastle's* case it was suggested that the jury should have been directed to consider whether the castle was an ancient possession of the plaintiff's family, whether he was likely to live there, and whether the neigbourhood was suitable for noble residents. It was contended that these matters were relevant to the "value" of the loss to the plaintiff. The court rejected the argument, considering such factors irrelevant to full compensation. This may have been so, but such questions, or analogous ones applicable to the present day, might well be thought relevant to "just" compensation. It is therefore submitted that the appropriate compensation should not, and would not, be determined by rule of thumb, but like precautions and provocation, in the light of all the circumstances.

It might be thought in passing that losses on the scale of stately homes are inappropriate to a statute such as the present one, which was probably designed to compensate the unfortunate small trader in a day when insurance was not so customary as now.[63]

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[59] Except, no doubt, a rioter.

[60] This was applied in *Rance* v. *Hastings Corporation* (1913) 136 L.T.Jo. 117. See also *Newcastle* v. *Broxtowe*, below.

[61] Which is paid out of the "police rate" (s. 2 (1)), *i.e.*, nowadays out of the public funds which provide for the upkeep of the local force.

[62] In that case the property was Nottingham Castle and the sum awarded £21,000!

[63] Consider the express provision about insurance noticed above under "The Loss" and the significant change in wording from "full" to "just."

The Claim

Section 3 provides that claims are to be made in the first instance to the local police authority of the district in which the damage occurred.[64] Normally they must be made within fourteen days of the damage, but an extension of this time up to forty-two days may be allowed in special circumstances.[65] The correct way of substantiating one's claim before the police authority is by producing estimates and similar documents, supported if necessary by statutory declarations.[66] If the authority refuses to award compensation, or the applicant thinks he has not been given enough, he may bring an action under section 4 (1).

The Action

Section 4 (1) gives an aggrieved claimant an action against the police authority on two grounds: either a " refusal or failure " to " fix compensation " ; or the award of inadequate compensation.[67] No new heads of claim, or any increase in the amount originally claimed, may be introduced in the action. If no compensation is recovered, or an amount not exceeding the original award, the plaintiff must pay the solicitor and client costs of the police authority.

It was held in *Jarvis* v. *Surrey C. C.*[68] that an action of this kind was not one for " penalties, damages, or sums of money given to the party grieved " within the Common Law Procedure Act, 1833, s. 3. It seems to follow that the Limitation Act, 1939, s. 3 (5), which provides a special limitation period of two years from accrual of the cause of the action in the case of actions to recover penalties or forfeitures, does not apply to actions under this section.[69] The same case decided that time for limitation starts to run from the refusal or failure of the authority to fix compensation, or from the making of an inadequate award. This is clearly correct. As was pointed out in the case, any other view would have the effect of making time run against the claimant during negotiations. Since it was further held that a delay in fixing was not a failure to do so, any other basis for computing time would be manifestly unsatisfactory.

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[64] subs. (1). For police authorities see the First Schedule. The procedure to be followed is laid down in S.R. & O., 1921, No. 1536 (see the *London Gazette*, October 7, 1921), which should be available for 6d. (subs. (3)).

[65] See the regulations in the previous note.

[66] In *Ford* v. *Met. Police District Receiver* [1921] 2 K.B. 344 it was held that the authority was not entitled to call for proofs of evidence from the claimant's witnesses.

[67] In *Ford's* case (previous footnote) a refusal to fix the compensation until the proofs of evidence were produced was held to be a refusal to fix within the section.

[68] [1925] 1 K.B. 554.

[69] The 1833 Act was repealed as to s. 3 by the 1939 Act.

Nevertheless the present situation is not free from potential difficulty. The difference between failure to fix and an unusual delay can only be a matter of degree, and periods of limitation presuppose a time certain for the accrual of a cause of action. The penalty for failure correctly to distinguish betwen dilatoriness and failure is payment of the costs of the police authority.[70] In the section the mandatory word " shall " is used when referring to these costs. The court therefore has no discretion in the matter; if the plaintiff fails, costs must be awarded against him.[71] If he succeeds, however, he cannot recover his own costs.[72] The justification for this rule is not clear.

It is a natural corollary to the implied failure on the part of the police that the elements of the crime of riot must be strictly proved by the plaintiff.[73] These elements are the simultaneous presence of at least three persons having the intention to assist one another, by force if necessary, in carrying out a common purpose, and the inception or execution of that purpose with a display of violence sufficient to alarm at least one person of reasonable firmness and courage.[74]

Merchant Shipping Act, 1894, s. 515

This section provides for the payment of compensation for the riotous plunder of vessels wrecked, stranded or distressed on or " near " the coasts of the United Kingdom " in the same manner, by the same authority," and out of the same funds as if the circumstances fell within the Riot (Damages) Act, 1886. Although only the award of compensation is referred to, it may be presumed that the right of action is also incorporated. The meaning of the word " near " was considered, in the context of section 546 of the Act (a salvage section), by Gorell Barnes J. in *The Fulham*.[75] He inclined to the opinion that the territorial limit should mark the end of " near," but found it unnecessary to decide the point since the spot he was immediately concerned with was some twenty miles off the coast and therefore not near on any view. The recent fate of "territorial waters" in international law renders it rather more uncertain than "near" as a guide. This Act is applied to aircraft by the Aircraft (Wreck & Salvage) Order, 1938, S.R. & O. No. 136, art. 2.

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[70] In this connection it is worth remembering that it is not the police with whom one is dealing, but the police authority. This is often a civic body which may have different ideas from the police on dispatch of business.

[71] *Gunter* v. *Met. Police District Receiver* (1888) 53 J.P. 250; 5 T.L.R. 59.

[72] Reg. 11. See footnote 64, above, for the regulations in force.

[73] *Field* v. *Met. Police District Receiver* [1907] 2 K.B. 853; *Ford* v. *M. P. D. R.* [1921] 2 K.B. 344; *Munday* v. *M. P. D. R.* [1949] 1 All E.R. 337.

[74] See the cases in the previous footnote.

[75] [1898] P. 206.

Third Parties

Larceny Act, 1916, s. 45 (3)

The text of this subsection is as follows:—

> "On the restitution of any stolen property if it appears to the court by the evidence that the offender has sold the stolen property to any person, and that such person has had no knowledge that the same was stolen, and that any moneys have been taken from the offender on his apprehension, the court may, on the application of such purchaser, order that out of such moneys a sum not exceeding the amount of the proceeds of such sale be delivered to the said purchaser."

The power contained in this subsection is conferred upon summary courts by the Magistrates' Courts Act, 1952, s. 33. The Larceny Act, 1916, s. 45 (3) appears to be the only example of compensation in criminal proceedings being expressly provided for in favour of a third party. It deals with the particular case of an innocent purchaser from a thief who loses the benefit of his purchase because a restitution order under section 45 (2),[76] to which section 45 (3) is complementary, has been made against him. As far as it goes this power is sensible, but unfortunately it depends on moneys being "taken from the offender on his apprehension." Even if these words are interpreted liberally (to cover, for example, money found at the offender's home during a search made some time after his arrest), this limitation must frequently make the power to compensate worthless.

The phrase "by the evidence" may conceal a trap for the unwary where there is a plea of guilty. Such a plea might well be accepted without evidence being called for, or at least with less evidence being led than on a plea of not guilty. Since "by the evidence" probably means "by the evidence led on the criminal charge," an applicant for compensation might find himself prevented from adducing further evidence in support of his claim. This is illustrated by the South African case of *Ruiters*.[77] The accused had pleaded guilty to a charge of malicious damage to property and when sentence was imposed compensation of 33s. was awarded against him under the Criminal Procedure and Evidence

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[76] As to which see [1957] Crim.L.R. 312 *et seq.*

[77] [1938] C.P.D. 40.

Act, 1917, s. 363 (1). When the case was reviewed Centlivres J. deleted the compensation order because section 363 (2) required the damage to be estimated by reference to the evidence. No evidence having been adduced on the plea of guilty, no order could be made. It does not necessarily follow that an applicant for compensation would be unable to put in evidence in support, but at least it would be a wise precaution to ensure that all the facts upon which he proposes to rely are proved technically as part of the trial.

It should be noticed that if the prosecutor refrains from applying for a restitution order on conviction and then brings a civil action instead, he thereby deprives the third party of his chance of claiming compensation in the criminal proceedings. The third party is then left to sue the offender. A way out of this difficulty seems to be for the third party to apply on his own initiative for a restitution order to be made. If this application is successful a further application for compensation can be made immediately. This solution seems to be a reasonable inference from the fact that third parties are entitled to be heard in opposition to the making of a restitution order.[78] If they are entitled to be heard in opposition to an order it seems to follow *a fortiori* that they may be heard in favour of one. The section is silent on the question who may apply for an order of restitution. There is no reason why this silence should be construed restrictively. The express use of the phrase " on the application of such purchaser " seems to preclude the court from making an order of compensation on its own initiative.

There is probably an overlap with the Forfeiture Act, 1870, s. 4.[79] If restitution of stolen property by a third party is ordered it may well be that he can then bring himself within section 4 as a " person aggrieved " by the commission of the offence. It is difficult to anticipate how far the courts might be prepared to carry the line of persons aggrieved if there were resales, but a direct purchaser from the thief should be safe. In such a case it is said [80] that the courts usually act under section 45 (3). The trouble with this is that for section 45 (3) to operate only moneys taken from the offender on his arrest are available for compensation, and the court can only act on evidence put in at the criminal trial. Neither of these limitations applies to section 4.

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[78] *Macklin* (1850) 5 Cox C.C. 216.

[79] Considered under " *Damage to Property*," above.

[80] Halsbury's *Statutes*, 2nd ed., p. 843; Archbold's *Criminal Pleading*, 33rd ed., p. 301.

The Magistrates' Association

By J. F. Madden, J.P., B.A., *Secretary*

The opening session of the Annual General Meeting of the Magistrates' Association was held on the afternoon of Thursday, October 17, at Lincoln's Inn, when Sir Hartley Shawcross gave an address on the position of the lawyer in court proceedings. There were, he assured his audience, no " tricks of the trade " for him to give away, for the lawyer appearing even in the most trivial cases performed the useful function of promoting justice, provided always that he remembered and was loyal to the ethics and traditions of the legal profession. It was true that an over-enthusiastic young advocate might quite innocently be led into the error of thinking that his only duty was by one means or another to get his client off. That was quite contrary to the ethics of the legal profession. The presence of an advocate in an apparently simple case did, said Sir Hartley, tend to lengthen the proceedings and make them more formal and technical, but the result should be that all the relevant circumstances of the case should have been brought out, and everything the magistrate ought to know and every argument that ought to be present in his mind should have been canvassed. " Time and time again one sees," continued Sir Hartley, " whether you are there as an advocate or whether you are sitting on the Bench, that this does not happen when there is no advocate to present the case." Magistrates did their best to help a defendant who was trying to conduct his own case, but they could not take the place of an advocate because they did not know, as an advocate would know, what facts there were which ought to be brought to their notice.

" What then," said Sir Hartley, " is the true function of the advocate in the courts? It is, of course, and this applies to both branches of the legal profession, to help in the administration of justice, not to thwart it, not to delay it, not to hinder it, but to assist in it."

A barrister was not entitled, and this was a very fundamental and necessary rule, to pick and choose his cases. He might not like the defendant or perhaps he might not like the kind of offence with which he was charged, which might be likely to attract public odium which could be deflected on to the advocate himself, but nevertheless in spite of such considerations it was the duty of the barrister to accept the brief offered to him. A very eminent French

Chancellor once put it in this way: "The advocate is placed for the good of the public between the tumult of human passions and the throne of justice; he is in the highest degree responsible to the judge and to his client and it is this double engagement which is the foundation of all his obligations." Shakespeare described the function of the lawyer as seeking to make the worse the better cause. "I am afraid," said Sir Hartley, "there are some lawyers who think that is their duty: but that is quite wrong. The barrister has to try to make what is in truth the better cause manifestly appear so to the court, or, if he has not got the better cause to advocate, then it is his duty to bring out the full explanation of why it is not the better cause and make some mitigation if he can." An advocate is not allowed to "think" in court: he can say to the Bench "I submit" or "I suggest," but never "I think." It would be an impertinence for an advocate to say that he thinks his client is innocent or that a particular witness is wrong or, unless he is trying to help the court in purely procedural matters, that the court ought to do this or that.

"The whole structure of our legal system both civil and criminal," said Sir Hartley, "depends on the existence of complete confidence between the lawyer and the court and the feeling on the part of judges or magistrates that they can rely on the lawyer playing the game according to the ethics and rules of his profession." He quoted a very great Chief Justice who once said: "An advocate ought to know how to reconcile the interests of his client with the eternal interests of truth and justice"; and Sir Hartley continued, "our system of justice does involve both sides, the prosecution and defence, having their cases argued and presented for them; but the object is not to pull wool over the eyes of the judges or magistrates, but in the end to elicit the truth."

It was a very strict rule that if a lawyer's client tells the lawyer he is guilty, then the lawyer must not call him as a witness in the proceedings to pretend he is not guilty: he must not say anything to pretend his client is not guilty, but must confine himself to doing what is required in law, namely, to seeing that the prosecution prove their case. Moreover, it was no part of a lawyer's duty to damage the reputation of the other party to the case, still less to try to damage the reputation of people who were only indirectly involved as witnesses. Nobody had the right to do that, unless the facts he was seeking to bring out were directly relevant to one of the issues in the case.

Again, it was the duty of the lawyer to bring to the notice of the court not only the cases which were in his favour but also those which were against him. It was his duty to keep the court right and to put all the relevant cases before it.

In summing up, Sir Hartley quoted a famous statement of Mr. Justice Crampton who, in speaking of the duties of an advocate, said: "He gives his clients the benefit of his learning, his talents and his judgment : but all through he never forgets what he owes to himself and to others. He will not knowingly mis-state the law, he will not knowingly mis-state the facts, though it be to gain the cause for his client. He will ever bear in mind that if he be the advocate of an individual and retained and remunerated for his valuable services, yet he has a prior and perpetual retainer on behalf of truth and justice."

Speaking of local advocates who often appear before magistrates, and also of police witnesses with whom magistrates may be familiar, Sir Hartley said: "One must always remember that while the accused person is presumed to be innocent until you find him guilty, there is no presumption at all in favour of the police witness or any other witness, or in favour or against the advocate who is appearing in the case. Do not blame the client for his advocate, and do not think the client is necessarily innocent because he has the most worthy advocate in the neighbourhood."

In answering questions Sir Hartley said it was an undesirable thing for the conduct of prosecutions to be in the hands of police officers ; for however fairly they might try to conduct the proceedings there was always the danger that a defendant might think, when he saw perhaps the local inspector conducting the case for the prosecution, probably, too, being on familiar terms with the clerk and the magistrates, that the case was not being presented with the degree of impartiality and objectivity which he would expect to find in the courts. The ideal, though Sir Hartley fully recognised the financial and other difficulties, would be to have the case presented not by the police but by a professional advocate.

Answering another question on the subject of psychiatric treatment, Sir Hartley said it was a very serious responsibility for the psychiatrist as well as for the magistracy to make quite sure that the psychiatrist had got the time and inclination and ability really to take the man under proper care. Too often people, discharged perhaps on a condition in a probation order that they are to have psychiatric treatment, went to some heavily over-loaded psychiatric unit at the local hospital, saw the psychiatrist for a few minutes and really received no proper treatment at all. It was a psychiatrist's duty to say in some cases: "I will treat him but I ought to say I do not think I should succeed."

At their session on October 18, in Guildhall, the meeting was welcomed by the Lord Mayor of London and then proceeded to adopt the annual report, which while recording the increasing activities of the Association and its branches also drew attention to the necessity of raising the annual subscription to cover them. In the afternoon the Lord Chancellor addressed the meeting as President of the Association, and while expressing his pleasure that the membership had passed the 10,000 mark he said he hoped it would go on increasing, so that the Association could become still more fully representative of the magistracy. He also referred to the celebration this year of the fiftieth anniversary of the probation system, which had meant so much to him throughout his own career.

He mentioned amongst recent inquiries likely to affect the functions of the magistrate, the Royal Commission on the Law Relating to Mental Illness and Mental Deficiency, Lord Tucker's committee to inquire into proceedings before examining justices, the Magistrates' Courts Act and Rules, 1957, and the committee under Lord Ingleby which is examining the jurisdiction and procedure of juvenile courts after the twenty-four years which have passed since the Children and Young Persons Act, 1933. He regretted that the figures of juvenile delinquency, after a steady fall since 1951, had again begun to rise, and said this trend would be likely to continue as children born during the birth-rate " bulge " after the war began to reach the age of twelve and over.

Mr. J. E. S. Simon, Joint Under Secretary for Home Office, then spoke to the meeting of the matters being dealt with by his department which were of interest to magistrates: amongst which were the questions of alternatives to short prison sentences, the after-care and supervision of discharged prisoners, the review of the maximum fines which magistrates might impose for certain offences, and problems of prison administration. He regretted that provision had not yet been made for the establishment of Remand Centres under the Criminal Justice Act, 1948, and said that the Government had in mind the re-introduction of a bill to legalise arrestment of wages in cases of arrears of maintenance, on the lines of the unsuccessful private member's bill which had been moved by Miss Joan Vickers during the last session of Parliament.

The meeting discussed various resolutions submitted by members, amongst which was one that the duties of usher in a magistrates' court should be performed, wherever possible, by a person engaged for that purpose and not by a policeman in uniform. In view largely, however, of financial and practical difficulties, this was not approved.

Resolutions which were passed were that a sentence of imprisonment for arrears of maintenance should not extinguish the debt, that magistrates in areas where detention centres existed should have power to use either the detention centre or a remand home under the provisions of section 54 of the Children and Young Persons Act, 1933, and that the efficacy of attendance centres would be greatly increased if the minimum age limit of twelve years were lowered by at least two years. A resolution expressing agreement with the Royal Commission's proposal to abolish justices' powers in the certification of patients, provided that the recommendation to set up Mental Health Review Tribunals be implemented at the same time, was lost by a majority of about two to one.

Practice and Procedure

Quarter Sessions

Failure to formulate a precise charge

In *R.* v. *Clarke* (Cheshire County Quarter Sessions; Chairman, J. D. Waters, Esq.; October 8), the prisoner was charged before the examining justices with breaking and entering a dwelling-house in the night with intent to commit a felony, contrary to section 25 (1) of the Larceny Act, 1916. The charge did not specify any particular felony. After the depositions of the prosecution witnesses had been taken, the charge in the above form was reduced into writing and read over to the accused, who was then committed for trial. The indictment before quarter sessions specified the intent as an intent to steal.

At the trial counsel for the accused moved to quash the indictment. The learned chairman held that as no precise charge had been formulated at the committal proceedings there had been an infringement of the general principle that an accused person should know the nature of the charge preferred against him and that, therefore, the provisions of rule 5 (3) of the Magistrates' Courts Rules, 1952 (which provide that the court shall cause the charge to be written down and read to the accused, and shall explain to him its nature in simple language) had not been complied with. Accordingly, the prisoner had not been lawfully committed for trial and therefore no bill of indictment could be preferred against him. [ALAN J. LEES, *Barrister-at-Law.*]

Summary Justice

Aircraft

Flying an aeroplane in a reckless manner and flying lower than 500 feet contrary to the provisions of the Air Navigation Order, 1954, s. 47, Sched. II; fined £5 on each count; White: Petersfield Magistrates' Court (*Manchester Guardian*, November 7).

Disturbances

"Unlawfully misusing a preacher at a congregation assembled for religious service" contrary to the provisions of section 12 of the Places of Religious Worship Act, 1812, by murmuring, slurring the responses and generally misbehaving; four youths each fined £3 and ordered to pay 8s. 4d. costs; Leicester Magistrates' Court (*Yorkshire Evening News*, October 19).

Firearms

Possessing two revolvers and a pistol, together with 48 rounds of ammunition, without a current firearms certificate contrary to section 1 of the Firearms Act, 1937; fined £50; Wilkinson: West London Magistrates' Court (*Manchester Guardian*, October 16).

Impersonation

Posing as a detective and "arresting" a man after showing him a chromium plated Metropolitan Special Constabulary badge; offence under the Town Police Clauses Act, 1847, s. 12; fined £7: Healy: Coleshill Magistrates' Court (*Birmingham Mail*, October 9).

Rent Act

Making false statements for the purpose of increasing rent contrary to section 2 (4) of the Rent Act, 1957; fined £5 on each of four summonses and ordered to pay £5 5s. costs on each; thirty other summonses were adjourned *sine die* pending a possible appeal; Powell: Wimbledon Magistrates' Court (*Manchester Guardian*, November 2).

Road traffic

Being in charge of a motor-scooter while under the influence of drink contrary to section 15 of the Road Traffic Act, 1930, as amended by the Road Traffic Act, 1956; fined £20 and ordered to pay £7 7s, costs; Connell: Bedford Magistrates' Court (*Evening Standard,* November 1).

Failing to notify the police of the movement of an abnormal load contrary to regulation 19 of the Motor Vehicles (Authorisation of Special Types) General Order, 1955; fined £10 on each of two charges; Blamires Transport Services: Aldridge Magistrates' Court (*Birmingham Mail*, October 21).

Travelling on a part of a public service vehicle (*i.e.*, the platform) not provided for the conveyance of passengers, and behaving in a disorderly fashion on the vehicle; fined £5 on each count and ordered to pay £5 5s. costs; McFarlane: Wigan Magistrates' Court (*Liverpool Echo*, October 22).

Ships

Navigating a motor launch on the River Dee without due care and caution contrary to the provisions of the Chester Corporation Act, 1929; fined £5; Bithell: Chester Magistrates' Court (*Manchester Guardian*, October 24).

Case and Comment *

Aiding and Abetting—*Knowledge of facts constituting an offence*

POULTRY WORLD, LTD. *v.* CONDER [1] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: October 11, 1957) (*The Times*, October 12, 1957).

In November, 1956, an advertisement appeared in *Cage Birds* in the following terms: "A.B.C.R. linnets £1; hawfinches, cocks 65s., hens 55s.; pair £5. Crossbills, cocks 50s., hens 45s. Particulars, Cooke, 27, Burleigh Avenue, Wigton Fields, Leicester." An information was preferred against the proprietors of the journal by the assistant secretary of the Royal Society for the Protection of Birds alleging that the proprietors had aided and abetted the offering for sale of live wild birds, hawfinches and crossbills, contrary to section 6 (1) (*a*) of the Protection of Birds Act, 1954.

Section 6 (1) (*a*) does not apply to a "close-ringed specimen bred in captivity"; but the justices found that hawfinches and crossbills were very difficult to breed in captivity, and that it was improbable that anyone could so breed them, at a profit, commercially. The justices also found, however, that the advertising manager of the journal had no knowledge of this difficulty or improbability. Nevertheless, the justices were of the opinion that no sufficient investigation had been made, and, accordingly, convicted the defendants.

Held, that a person could not be convicted of aiding and abetting unless he had knowledge of the facts which constituted the offence or unless he deliberately abstained from obtaining such knowledge. Since in the present case there was neither knowledge nor deliberate abstention, no offence had been committed. [D. C.]

COMMENTARY. The principle of the present case has been asserted repeatedly in recent years. See *Ferguson* v. *Weaving* [1951] 1 K.B. 814; *Ackroyds Air Travel* v. *D.P.P.* [1950] 1 All E.R. 933; *Johnson* v. *Youden* [1950] 1 K.B. 544. The court made it plain that a future prosecution of the same company, on similar facts, might have different results; for the present case must have opened their eyes as to the dangers of accepting advertisements relying on the good faith of the advertiser. Unquestioning acceptance of such advertisements in future might be such negligence as to amount to deliberate shutting of the eyes, *i.e.*, connivance.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentary by J. C. Smith, LL.B.(Cantab.), Barrister-at-Law.

[1] For the appellants: *Geoffrey Lawrence Q.C., Bernard Finlay* (instructed by Good, Good & Co.). For the respondent: *F. H. Lawton Q.C., Michael Havers* (instructed by Baileys, Shaw & Gillett).

Appeal—*Notice of abandonment*

R. *v*. WICKHAM [2] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Donovan JJ.: October 3, 1957).

W. was convicted at quarter sessions in March, 1957. On April 4 he applied to the Court of Criminal Appeal for leave to appeal against conviction and sentence. This application was refused by a single judge on May 21. On May 23 W. gave notice of his intention to appeal to the full court against the refusal of his application in respect of sentence, and stated that he did not wish to proceed with his appeal against conviction. On May 25 W. signed a notice of abandonment. On application to the court for leave to continue his appeal against conviction:—

Held, following *R*. v. *Moore* [1957] Crim.L.R. 606, that there was no power to allow a notice of abandonment to be withdrawn unless it had been given under some mistake. In addition W. had not appealed to the full court from the refusal of his application for leave to appeal against conviction within five days, as required by the Criminal Appeal Rules, 1908, r. 25 (6), and the effect of that was that W.'s appeal was dismissed. Thus, the court had no jurisdiction to entertain W.'s present application. [H. P.]

COMMENTARY. See *R*. v. *Healey* [1956] Crim.L.R. 257 and commentary thereon.

Evidence—*Recalling witness after summing-up*

R. *v*. WILSON [3] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Donovan JJ.: October 2, 1957) (*The Times*, October 3, 1957).

W. was convicted at quarter sessions of breaking and entering and of being in possession of housebreaking implements by night. The evidence at the trial was that a cinema had been broken into and that W. was found there. One of the witnesses, Miss L., who was the secretary and cashier of the cinema, gave evidence that she left the cinema at 11 p.m. and that later, after having coffee, she returned. After the jury had been considering their verdict for some time they returned to ask: " Why did Miss L. go back? " The deputy chairman then recalled Miss L. and, in answer to the question, she said that she had seen what she thought were suspicious people, and also that the boiler room door was open. On appeal to the Court of Criminal Appeal:—

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[2] The applicant did not appear and was not represented. The Crown was not represented.

[3] For the appellant: *Roger Titheridge* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *D. A. Hollis* (instructed by the Solicitor, Metropolitan Police)

Held, allowing the appeal, that the court was bound by *R.* v. *Owen* [1952] 2 Q.B. 362, where the ruling was given that, once the summing-up was concluded and the jury were out to consider their verdict, no further evidence could be given. In the present case, the right course would have been for the deputy chairman to have read the evidence of Miss L. to the jury. Although there was the clearest possible evidence of W.'s guilt, the court would not apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907 (on the ground that there had been no miscarriage of justice), because that would in effect be overruling *Owen's* case. For these reasons the conviction would be quashed. [H. P.]

COMMENTARY. It is difficult to see why the court felt unable to apply the proviso to section 4 (1) in the present case. The question asked by the jury was an irrelevant one and, the Lord Chief Justice said, " did not seem to have advanced the case one iota." It was " a case of the clearest possible description "; the accused was " as guilty as he possibly could be," yet his conviction was quashed.

It is difficult to follow why applying the proviso would have been, " in effect," to overrule *Owen's* case. If the court had made it plain that they were deciding the point of law in favour of the appellant, the effect would surely have been to enhance the authority of *Owen's* case, notwithstanding that the conviction in the present case was affirmed.

Evidence—*Statement of person not called as a witness*

R. *v.* COTTON [4] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Donovan JJ.: October 3, 1957).

The Court of Criminal Appeal, dismissing C.'s application for leave to appeal, said that they desired to call attention to part of the cross-examination of the accused at the trial. The relevant part was as follows: " Q.—Have you a brother? A.—Yes. Q.—Ronald Cotton? A.—Yes. Q.—Does he live at 188, Hard Lane, St. Helens? A.—Yes." The point of asking the address was that C. had said that his home address was 188, Hard Lane, St. Helens. A document was then handed to C. and the cross-examination continued: " Q.—Look at that signature. Is that his signature? A.—I don't know, I don't know. Q.—You do not know whether that is your brother's signature or not? A.—No. Q.—This is a statement made by the brother. I am suggesting that, in fact, you did not stay at that house, that you left it on the 18th February and you have not slept there since. Is that right or wrong? A.—Wrong. I didn't stay there on the 18th because I was at my sister's house, but I did go back in that fortnight, for two nights. He has made a mistake. Q.—You did not sleep there on the night of the 25th February? A.—What day is that? Q.—A Monday. A.—Yes. Q.—You are on oath. A.—Yes." The court desired to draw attention to the fact that this cross-examination on that document was quite improper and irregular. The effect was to get into the jury's mind that there was evidence by C.'s brother contradicting the evidence of C. without the brother being called and without C. having the opportunity to cross-examine or challenge his evidence. [H. P.]

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[4] The applicant did not appear and was not represented.

COMMENTARY. The document, though signed by C.'s brother, was hearsay evidence and inadmissible to prove the truth of any facts asserted in it. To bring the statements made in the document to the attention of the jury, whether directly or indirectly, would be clearly improper.

False Pretences—*Existing fact—cheque*

R. *v.* MAYTUM-WHITE [5] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Donovan JJ.: October 2, 1957).

M. was convicted at quarter sessions of obtaining tickets for a stage performance by falsely pretending " that a certain piece of paper writing . . . was then a good and valid order for the payment of eight guineas," and that he then " had full power and authority to draw a cheque upon a certain bank, to wit, D.'s bank." M. had purported to pay for the tickets by a post-dated cheque drawn upon a bank where he had no account. On appeal to the Court of Criminal Appeal M. contended that there was no false pretence of an existing fact sufficient to support the conviction on the main ground that, as the cheque was post-dated, there was no representation on M.'s part that he had the funds necessary to meet the cheque.

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[5] For the appellant: *M. D. L. Worsley* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *O. S. Macleay* (instructed by the Solicitor, Metropolitan Police).

Held, dismissing the appeal, that by giving a post-dated cheque, there was no representation that there was then the money in the bank, but here M. gave a cheque drawn on D.'s bank and thereby represented that he was a customer of that bank. M. was, therefore, representing that he had power and authority to draw a cheque on D.'s bank. It had been proved that M. was not a customer of the bank and the false pretence alleged in the indictment was, therefore, proved. [H. P.]

COMMENTARY. Before a man can be convicted of obtaining by false pretences it must be proved that he had made a misrepresentation of present fact, as opposed to a promise or statement of intention: *R.* v. *Dent* [1955] 2 Q.B. 590; [1955] Crim.L.R. 501.

It has been held (*R.* v. *Hazelton* (1874) 2 C.C.R. 134) that drawing a cheque involves three representations of present fact: (1) that the drawer has an account with the bank on which the cheque is drawn; (2) that he has authority to draw on it for the amount of the cheque; and (3) that the cheque, as drawn, is a valid order for the payment of that amount.

Food — *Risk of contamination — whether actual contamination necessary*

MAC FISHERIES (WHOLESALE AND RETAIL), LTD. *v.* COVENTRY CORPORATION [6] (Q.B. Divisional Court: Lord Goddard C.J., Donovan and Havers JJ.: October 18, 1957) ([1957] 1 W.L.R. 1066).

M., Ltd. were convicted on eight informations charging them that they, being persons engaged in the handling of food, namely fish, permitted the fish to be so placed as to involve the risk of contamination, contrary to regulation 8 (*a*) of the Food Hygiene Regulations, 1955, made under section 13 of the Food and Drugs Act, 1955.

The justices had found that the risk of contamination was not of such a nature as to be injurious to health; but since they were of the opinion that injury to health was immaterial, they had convicted: mere risk of contamination, they considered, sufficed.

Held, that the object of the statute—and, therefore, of the regulations—was to procure the protection of public health. This must be borne in mind in construing the regulations. All food was subject to some contamination. If there was no contamination which was injurious to health, there was no offence. Since, in the present case, there was no such contamination, no offence had been committed. [D. C.]

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[6] For the appellants: *J. M. G. Griffiths-Jones* (instructed by Simpson, North, Harley & Co.). For the respondents: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co.).

COMMENTARY. The court pointed out there was *some* risk of contamination however the fish were dealt with after leaving the sea. The limit imposed by the court would seem to fulfil the apparent object of the regulation, and to accord with the rule of construction that, where there is a doubt, it should be resolved in favour of the accused.

Forgery—*Entries in account book—character of the document unaltered*

R. *v*. HOPKINS; R. *v*. COLLINS[7] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery, Byrne, Finnemore, Donovan JJ.: October 3, 11, 1957) (*The Times*, October 4, 12, 1957).

H. and C. were convicted at quarter sessions of offences of fraudulent conversion and forgery. H. and C. were the secretary and treasurer respectively of a football supporters' club and, in those capacities, had charge of certain moneys belonging to the club. H. and C. made false entries in their books of account relating to these moneys and fraudulently converted some of the moneys to their own use. On appeal to the Court of Criminal Appeal, the appellants argued, with regard to the offences of forgery, that the mere alteration of the books of account did not amount to forgery; that the Forgery Act, 1913, did not replace the common law rule relating to forgery that the offence was not committed if the character of the document remained unaltered, so that *Re Windsor* (1865) 6 Best & Smith 522 applied; and that the offences amounted to falsification of accounts, with which the appellants were not charged.

Held, dismissing the appeal, that as forgery was now a statutory offence, the court was only concerned with the Forgery Act, 1913, as amended by the Criminal Justice Act, 1925. The court had seen the books of account and it was plain that both individual items and totals had been falsely entered so that the document gave a wholly false impression of the amount that ought to have been in the hands of H. and C. Forgery was now defined by section 1 of the Act of 1913 and, in the opinion of the court, the present case clearly fell within that section. Accordingly, the appeal would be dismissed. [H. P.]

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[7] For the appellant Hopkins: *J. R. Whitley* (instructed by the Registrar, Court of Criminal Appeal). For the appellant Collins: *J. A. Cox* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. Scott Henderson Q.C., C. F. Ingle* (instructed by Messrs. F. S. and R. A. Ingle, Bath).

COMMENTARY. It was the rule at common law and is still accepted as law by many of the textbooks (*e.g.*, Russell on *Crime* 1453; Halsbury's *Statutes*, V, 982) that a document is false for the purposes of the law of forgery, only when it purports to be that which it is not; or, as Kenny put it (*Outlines of Criminal Law*, 16th ed. 305) when it " tells a lie about itself." A document " tells a lie about itself " when, *e.g.*, it purports to be made by one who did not make it, or purports to be made on a day on which it was not made, or purports to be X's cheque for £10 when X drew it for £1 only. It was not enough at common law for a document merely to make untrue statements, to tell lies, not about itself. Thus, in *Re Windsor* it was held to be no forgery for a bank clerk, falsely and with intent to defraud, to enter a certain sum in a book of the bank, as assets of the bank. The book certainly told a lie, but not about itself. " Telling a lie does not become forgery because it is reduced to writing," said Blackburn J.

The document in the present case did not purport to be that which it was not. It simply told lies and, therefore, would not have been " false " at common law. The Forgery Act, 1913, s. 1 (1), provides that forgery " is the making of a false document in order that it may be used as genuine." Section 1 (2) specifies a number of cases in which a document is false within the meaning of the Act.

The Criminal Justice Act, 1925, s. 35 (1), provides that a document may be false for the purposes of the Forgery Act, 1913, notwithstanding that it is not false in the manner described in section 1 (2) of that Act. The effect of this is presumably to preserve any common law instances of falsity not specified in section 1 (2) of the Forgery Act. The present case seems to hold that some clause in section 1 (2) has extended the law. It is not, at present, clear which clause has this effect. The only example which, it would seem, could conceivably cover the present case is that which says a document is false " if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein." Even this clause, however, would seem to postulate a completed document, to which alterations are later made.

Hackney Carriage—*Demand in excess of proper fare by driver*

ROSENBLOOM *v.* MCDONNELL [8] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: October 10, 1957) (*The Times*, October 11, 1957).

At about 2.15 a.m. on December 24, 1956, a man hailed a taxi which was plying for hire in Charing Cross Road, and asked the driver if he would drive him to the General Post Office, wait for him there and bring him back to Charing Cross Road, saying that he would " see him all right." The driver accepted the hire, and was kept waiting for some forty minutes outside the General Post Office. At the end of the hire the meter registered 8s. 6d., in addition to which the driver was entitled to charge the "Suez" sixpence. The driver refused to accept an offer of 12s. 6d., saying that the prolonged wait outside the General Post Office entitled him to a double fare. On an information preferred for unlawfully demanding more than a proper fare, contrary to section 17 (1) of the London Hackney Carriage Act, 1853, section 15 of the Metropolitan Public Carriage Act, 1869, and the London Cab Order, 1934, the Chief Magistrate of the Metropolitan Police District found the charge proved but gave the defendant an absolute discharge. On appeal:—

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[8] For the defendant: *James Borders, Gabriel Cohen* (instructed by Philip, Conway, Thomas & Co.). For the prosecution: *Paul Wrightson* (instructed by the Solicitor, Metropolitan Police).

Held, dismissing the appeal, that when the man had said that he would "see him all right," all he had meant was that there would be a good tip. The only question for the court was the nature of the hiring: this was an ordinary hiring, the fare for which was determined by a combination of time and distance [D. C.]

COMMENTARY. It is an offence under section 17 (2) of the London Hackney Carriage Act, 1853, for a driver of a hackney carriage to refuse to drive to any place within the limits of the Act, provided that the journey does not exceed six miles in distance or one hour in duration. Under section 17 (1) of the Act it was an offence for a driver to demand or take more than the proper fare specified in the Schedule to the Act. Section 17 is continued in force by section 15 of the Metropolitan Public Carriage Act, 1869, but the proper fare is now that prescribed in the London Cab Order, 1934, which is made under the authority of section 9 of the Act of 1869.

Where a passenger wishes to be carried for more than six miles (or, presumably, for longer than an hour) the driver may make a special bargain with the passenger without regard to the prescribed fares: *Goodman* v. *Serle* [1947] K.B. 808. In the present case, it appears that there was no question of the hiring being for more than six miles, or longer than an hour, and so the prescribed fare applied.

Hire-Purchase—*Failure to comply with statutory regulation—absolute liability*

R. *v*. ST. MARGARET'S TRUST, LTD.[9] (Central Criminal Court: Diplock J.: September 16, 1957) (*The Manchester Guardian*, September 17, 1957).

The defendant company was charged, with others, on an indictment containing seven counts relating to the disposal of motor-cars by hire-purchase without a deposit of at least 50 per cent. being paid, contrary to article 1 of the Control of Hiring Order, 1956 (S.I. No. 179). The defendant company was carrying on the business of merchant banking and provided the finance for the transactions which took place, in fact, between O., Ltd. (who were motor-car dealers), and the hire-purchaser. O., Ltd. was also one of the defendants. The case for the prosecution was that a deposit of less than 50 per cent. had been accepted by O., Ltd., and that the hire-purchase documents had been altered before submission to the defendant company so as to give the impression that the proper deposit had been paid. The case for the defendant company was that they entered into these transactions on the basis of information supplied to them by O., Ltd., and, as there was no absolute liability under article 1 of the Order, they incurred no liability in law in the absence of any knowledge as to the falsity of the information supplied.

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[9] For the defendant company: *Gerald Gardiner Q.C., John Lawrence* (instructed by Dennison, Horne & Co.). For the Crown: *F. H. Lawton Q.C., Neville Faulks* (instructed by the Solicitor, Board of Trade).

Diplock J. reviewed the evidence and directed the jury that there was an absolute liability on the defendant company under the terms of the Order, and that it was, therefore, no answer in law for the defendant company to say that they had been given false information by O., Ltd. The jury found the defendant company guilty.

The defendant company was fined £35. Diplock J. said that if other persons were charged with deliberately flouting the Order and fabricating documents they could expect sentences of imprisonment.

A certificate to appeal was granted on the ground that the decision was contrary to an earlier (unreported) decision of Barry J. on similar facts. [H. P.]

COMMENTARY. For S.I. 1956, No. 179, see [1956] Crim.L.R. 279 which was revoked and replaced by S.I. 1956, No. 1269; [1956] Crim.L.R. 705 amended by S.I. 1956, No. 1498; [1956] Crim.L.R. 846.

A person can be convicted of aiding and abetting the commission of an offence only if he knew of all the circumstances which constituted the offence: *Ackroyds Air Travel* v. *D.P.P.* [1950] 1 All E.R. 933; *Johnson* v. *Youden* [1950] 1 K.B. 544; and see *Poultry World, Ltd.* v. *Conder, supra,* p. 803.

Where, however, the person is charged *as a principal in the first degree* with an offence of strict or absolute liability, he may be convicted, even though he did not know of some essential constituent of the offence. The St. Margaret's Trust, Ltd., was charged as a principal in the first degree.

In *Reynolds* v. *Austin* [1951] 2 K.B. 135, 143, Humphreys J. said that the rule of absolute prohibition did not apply "to the case of a defendant charged with having done an act lawful in itself but which had become unlawful as the result of some action entirely unknown to him by some other person not his servant or agent." Lord Goddard C.J. said (p. 145): "that doctrine (of absolute prohibition) has never been applied, as far as I know, to a case where the prohibited act was not that of the defendant, but of some person over whom he had no control and for whom he had no responsibility."

These dicta might be held inapplicable in the present case on the ground that O., Ltd., was the agent of the St. Margaret's Trust, or was a person for whom the trust had responsibility. There is, in any event, some difficulty in reconciling the dicta in *Reynolds* v. *Austin* with the decision in *Parker* v. *Alder* [1899] 1 Q.B. 20.

Merchant Shipping—*Refusal by the crew to prepare ship for sea—refusal unreasonable*

PUGH *v.* O'NEIL HENVILLE AND OTHERS [10] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: October 4, 1957) (*The Times*, October 5, 1957).

In August, 1956, the respondents signed articles to become the crew of a ship for voyages over a period of two years. With the rise of the Suez crisis the Government requisitioned the ship so that she might carry a cargo containing ammunition to Cyprus. The crew refused to prepare the ship for sea, asserting that the Mediterranean was, or soon would be, a war zone. They made it clear that they considered that a voyage there would expose them to danger. Informations were laid by the master under the Merchant Shipping Act, 1894, alleging refusal by the respondents to obey orders to prepare the ship for sea. The justices were of the opinion that the respondents were justified in refusing to obey the orders, and dismissed the informations.

Held, allowing the appeal, that there was no evidence that the respondents' refusal to prepare the ship for sea was reasonable; indeed it had been found that the Mediterranean was not regarded as an area of exceptional risk or as a war zone. It was not sufficient for seamen to say that they thought that there was a risk, when, in fact, general opinion and the opinion of those involved in shipping said that there was no risk. [D. C.]

COMMENTARY. The report does not specify the section under which the accused were charged. It is, however, an offence punishable with four weeks' imprisonment under section 225 (1) (*b*) for a seaman wilfully to disobey any lawful command; and under section 225 (1) (*c*), continued wilful disobedience to lawful commands is punishable with twelve weeks' imprisonment.

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[10] For the appellant: *Montague Berryman Q.C., T. E. Rhys Roberts* (instructed by Botterell & Roche for Llewellyn & Hann, Cardiff). For the respondents; *Elwyn Jones Q.C., W. T. Williams* (instructed by Rhys Roberts & Co., for Abse (Leo) & Cohen, Cardiff).

The question of what circumstances justify seamen in refusing to proceed to sea was considered by the House of Lords in *Palace Shipping Co., Ltd.* v. *Caine* [1907] A.C. 386. Lord James said (p. 394): "In determining what amounts to a justification for seamen refusing to proceed to sea, I do not think that they are called upon to prove by positive and legal evidence that there was an actual probability of capture; their decision has to be formed upon such general information as is at the moment at their disposal. Doubtless their decision must not be based on merely arbitrary grounds. Good faith is a necessary element, and such good faith would not exist unless some reasonable grounds for the refusal can be alleged."

The present case seems to show that good faith, while no doubt essential, is not, by itself, enough. The justices found that the defendants honestly and reasonably thought they were going to a war zone. The Divisional Court seems to have held that there was no evidence on which this belief could be held to be reasonable, but they do not seem to have interfered with justices' finding that it was honest. An honest belief as to the existence of special dangers must, it seems, be based on reasonable grounds to afford a defence.

Murder—*Duress—cause of death*

ROSSIDES *v.* R.[11] (Judicial Committee of the Privy Council: Lords Reid, Cohen, Somervell of Harrow, and the Rt. Hon. L. M. D. de Silva: October 2, 1957) (*The Times,* October 3, 1957).

On February 5, 1957, a body, alleged to be that of S., was found buried in a field in Cyprus. A post-mortem examination revealed a cerebral trauma, due to the fracture of the skull, and two bullets inside the body. R. confessed that he had shot at S.; but said that he had done so under threats from others who were present at the time. He was charged with murder by shooting. At his trial it was said that the death of S. was due not to the bullets but to the cerebral trauma. The judge accepted R.'s confession and the explanation which he had given as truthful; but said that it was unnecessary for him to determine the cause of death: R. had been acting in concert with others, and each was equally guilty of any offence which might have been committed. On appeal from the Supreme Court of Cyprus, it was submitted that (*a*) R. could only have been convicted if it could have been shown that shooting was the cause of the death of S.; and (*b*) that the general rule applicable to persons acting in concert was inapplicable to persons acting under duress.

The petition was dismissed. [D. C.]

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[11] For the petitioner: *B. J. M. MacKenna Q.C., D. A. Grant* (instructed by Bishoff & Co.). For the Crown: *Gerald Howard Q.C., J. G. Le Quesne* (instructed by Charles Russell & Co.).

COMMENTARY. There is very little authority on the nature of the defence of duress. It seems to be generally agreed that, in so far as duress is a defence at all, a threat of death is sufficient duress: see Glanville Williams, *The Criminal Law, The General Part*, § 185. The accused was threatened with death in the present case. The weight of authority, however, is to the effect that duress is not a universal defence and, in particular, that it does not apply to a charge of murder. Whether this was the basis of the present case does not appear as their Lordships have not given reasons for their decision.

Murder—*Lion-man hired out—whether keeper an accessory or principal in the second degree*

MUHANDI *v.* R.[12] (Judicial Committee of the Privy Council: Lords Reid and Denning, and the Rt. Hon. L. M. D. de Silva: October 21, 1957) (*The Times*, October 22, 1957).

M., S. and G. were jointly charged with the murder of X. It was alleged that S. and G. had hired a " lion-man " from M. to murder X. [A " lion-man " was defined (on appeal) as " a human being who has been brought up as a beast to kill on the orders of those in charge of him, and to kill with bestial ferocity. While employed in its inhuman task the creature disguises itself in the skin of a lion, or partly in lion skins and partly in baboon skins."] The three accused were all found guilty and sentenced to death.

Dismissing M.'s appeal, the Court of Appeal for Eastern Africa said: " It is a common feature of these fantastic and disgusting cases that the lion-man who is the actual killer in every case appears to be kept under control by a keeper who is sometimes a man and sometimes a woman, but who is invariably paid a sum of money before releasing the lion-man for the work in hand. . . . This court has come to the conclusion . . . that where there is evidence, from which the inference is inescapable, that a keeper released a lion-man for money received, and handed him over to another, with the knowledge that the hirer intended that the lion-man should proceed to a spot and there kill a person, such keeper is a principal offender to the crime of murder."

It was submitted on behalf of M. that since the lion-man was not under the control of M. at the time of the killing of X, but under the control of S. and G., no offence had been committed by M.; but it was submitted on behalf of the Crown that control was irrelevant: if M. purposely enabled the offence to be committed he was equally guilty with S. and G.

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[12] For the petitioner: *Phineas Quass Q.C., Ralph Millner* (instructed by T. L. Wilson & Co.). For the Crown: *J. G. Le Quesne* (instructed by Charles Russell & Co.).

Their Lordships advised that the petition should be dismissed. [D. C.]

COMMENTARY. Whether the supplier of materials, which are to be used to commit a crime, is guilty as an accessory or principal in the second degree is a difficult question which is discussed in great detail by Glanville Williams, *The Criminal Law, The General Part*, § 58. The lion-man in the present case seems to have been neither more nor less than a lethal weapon. In the most recent case, *R.* v. *Bullock* (1954) 38 Cr.App.R. 151, the Court of Criminal Appeal held that where the accused provided a car, knowing that it was to be used for an unlawful purpose but not knowing the details of the particular crime, he was guilty as an accessory before the fact to the housebreaking and larceny which was in fact committed.

The present case would seem to be at least as strong as *Bullock* as M. apparently knew that his lion-man was to be employed to commit a murder.

Murder—*Provocation—oral*

R. *v.* SIMPSON [13] (Central Criminal Court: Diplock J.: September 23, 1957) (*The Times*, September 24, 1957).

S. was charged with the murder of his wife by strangulation. S. admitted the act of killing but gave evidence of provocation consisting of nagging and threats by his wife. S. said that for two nights prior to the killing he had been kept awake by his wife shaking him whenever he fell asleep, and that immediately prior to the killing his wife had given him the choice of providing her with grounds for a divorce or she would go away with the child of the marriage on payment by him of £4 per week. S. further said that his wife had threatened that, if he refused either of the courses suggested by her, she would arrange to " get his head bashed in."

Diplock J. reviewed the evidence and directed the jury that it was a question for them whether they accepted S.'s evidence and whether, if they did, they thought that a reasonable man would have been so provoked to act in the way in which S. acted. The jury found S. guilty of manslaughter.

S. was sentenced to five years' imprisonment. [H. P.]

COMMENTARY. Before the Homicide Act, 1957, it was doubtful whether words could ever constitute a sufficient provocation, and clear that they could do so only "in circumstances of a most extreme and exceptional character": *Holmes* v. *D.P.P.* [1946] A.C. 588. Section 3 of the Act (which refers to provocation "by things done or by things said or by both together") clearly contemplates that words alone may now be enough.

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[13] For the defendant: *E. Ryder Richardson Q.C., E. A. Machin* (instructed by Hilary Edell, Esq.). For the Crown: *Christmas Humphreys, M. Griffith-Jones* (instructed by the Director of Public Prosecutions).

Diplock J. must have held that there was evidence on which a jury could find that S. was provoked to lose his self-control. This would seem to be still a question of law for the judge. The questions for the jury would then be: (1) Was S., in fact, so provoked as to lose his self-control? (2) Would a reasonable person in S.'s position have been so provoked? The jury must have answered both these questions in the affirmative. Before the Act it would have been open to Diplock J. to rule that no reasonable man would have been provoked to lose his self-control in these circumstances. Now it would seem that, once he had found that there was evidence that S. was so provoked, he would be obliged to leave the two questions specified above, to the jury.

Murder—*Self-defence and provocation*

BULLARD *v.* R.[14] (Judicial Committee of the Privy Council: Earl Jowitt, Lord Tucker and the Rt. Hon. L. M. D. de Silva: July 16, October 2, 1957) ([1957] 3 W.L.R. 656).

At his trial for murder the appellant relied on the defences of self-defence and provocation. The jury rejected the defence of self-defence; and the trial judge had withdrawn the issue of provocation from the jury on the ground that the appellant's evidence had not established it. On appeal against his conviction, the Court of Criminal Appeal for Trinidad and Tobago took the view, relying on *Mancini* v. *D.P.P.* [1942] A.C. 1, that since the jury had rejected the defence of self-defence, there was no evidence on which the issue of provocation could be based, and accordingly dismissed the appeal.

Held, that *Mancini's* case did not support a proposition of universal application that evidence adduced in support of an unsuccessful defence of self-defence could never be relied upon as affording provocation sufficient to reduce the offence from murder to manslaughter. Conduct which could not justify might well excuse. Every man on trial for murder had the right to have the issue of manslaughter left to the jury if there was any evidence on which such a verdict could be given. To deprive him of that right constituted a grave miscarriage of justice. The verdict of guilty of murder would be set aside, and the case remitted to the Court of

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[14] For the appellant: *Ralph Millner, Jenny Bisschop* (instructed by T. L. Wilson & Co.). For the Crown: *J. G. Le Quesne* (instructed by Charles Russell & Co.).

Criminal Appeal for a verdict of manslaughter to be recorded and the appropriate sentence passed. [D. C.]

COMMENTARY. When the defence of self-defence is established it entitles the accused to be acquitted completely, whereas the " defence " of provocation, when successful, leaves the accused liable to be convicted of manslaughter. It would, therefore, seem logical that acts of the deceased, which would not justify killing him in self-defence, may yet amount to such provocation as will reduce the crime to manslaughter. The explanation of *Mancini's* case is that it was clear that the jury had disbelieved the only evidence offered which was capable of amounting to provocation. Macnaghten J. told them to acquit altogether on the grounds of self-defence if they believed the evidence, and they convicted of murder. In other cases, however, a jury while accepting the evidence of the defence, might properly hold it inadequate to establish self-defence, but enough to amount to provocation.

Road Traffic—*Dangerous driving*—*Road Traffic Act*, 1930, *s.* 11

SQUIRE *v.* METROPOLITAN POLICE COMMISSIONER[15] (Q.B. Divisional Court: Lord Goddard C.J., Hilbery and Donovan JJ.: October 10, 1957) (*The Times*, October 11, 1957).

On October 14, 1956, the defendant was driving his car, at speed, in a northerly direction along Greenford Road, Middlesex. In front of him there was a bus and two cars beyond the bus which had just overtaken the bus. The defendant pulled out to overtake the bus, and, finding that the cars had not drawn into their nearside after overtaking the bus, pulled out still further to overtake them. There was, however, a car approaching him from the other direction, travelling on its correct side of the road, but near to the crown. The justices found the defendant guilty of dangerous driving, fined him 100 guineas and disqualified him from driving for three months. On appeal to quarter sessions the appeals committee held that although the defendant might have been guilty of an error of judgment, or driving without due care and attention, he was not guilty of driving in a manner dangerous to the public; and accordingly stopped the case at the close of the evidence for the prosecution. On appeal by the Commissioner of Police of the Metropolis:—

Held, that, in taking the view that there was no prima facie case against the defendant, the appeals committee had come to a perverse finding. The case would be remitted to quarter sessions with a direction that it should be heard by different magistrates. [D. C.]

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[15] For the prosecution: *F. H. Lawton Q.C., Paul Wrightson* (instructed by the Solicitor, Metropolitan Police). For the defendant: *John Hobson Q.C., Ian McCulloch* (instructed by Keith Hall, Greenford, Middlesex).

Road Traffic—*Hindering free passage along highway—passenger in vehicle*

POLICE *v.* PEARSON [16] (Bradford Quarter Sessions: N. Harper, Esq., Recorder: September 19, 1957).

Mrs. P. appealed from her conviction by Bradford City magistrates on a charge under Highway Act, 1835, s. 78, that she did by negligence hinder the free passage of a person on the highway. A Mrs. Bateman was walking along the pavement about 3 feet from the edge of the kerb when a motor-car which was travelling in the same direction drew up to the kerb alongside her. As the car stopped Mrs. P., a passenger sitting in the front nearside seat, opened the nearside door which opened forwards and struck Mrs. Bateman in the back, throwing her to the ground. She later had to have six stitches in her foot. For the prosecution it was submitted that the words used in the statute " . . . if any person shall in any manner . . . by negligence or misbehaviour prevent, hinder or interrupt the free passage of any person . . . on any highway" were clear, unambiguous and comprehensive and could apply not merely to drivers of vehicles but also to passengers, and indeed were wide enough to cover pedestrians. The prosecution relied on *Williams* v. *Evans* (1876) 1 Ex.D. 277 and *Watson* v. *Lowe* [1950] 1 All E.R. 100. The appellant submitted that there was no case to answer. "Any person" must be read *ejusdem generis* with the types of persons referred to in the rest of the section. No reference was made anywhere in the section to passengers in vehicles. Field J. in *Williams v. Evans* (*supra*), at p. 284 said: "Three classes of persons are mentioned, whom it was intended to punish for breaches of the statute: drivers of waggons and other carriages, drivers of horses or mules without vehicles, and riders properly so called." It was submitted that that was a correct statement of the law and was supported by dicta of Lord Goddard C.J. in *Shears* v. *Matthews* [1948] 2 All E.R. 1064. Counsel for the prosecution in reply argued that it was ridiculous that the driver should be criminally liable and a passenger not for identical acts, and that if the restricted interpretation argued for by the appellant were correct the section would have to read " . . . if any *such* person *as aforesaid*. . . ."

Held, allowing the appeal, that when one read section 78 as a whole one was driven irresistibly to the conclusion that the persons who were caught by that section were persons who were drivers of vehicles and drivers (which included riders) of mules or beasts of draught or burden. There was nothing aimed at the negligence of the person who was simply a passenger with no part in the driving. This interpretation was supported not only by the penalty clause but by the subsequent clauses of the section. The section did not enact any offence which could be committed by a passenger.

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[16] For the prosecution respondent: *A. B. Boyle* (instructed by Town Clerk, Bradford). For the appellant: *J. Stanley Snowden* (instructed by Eaton Smith & Downey, Huddersfield).

[JOHN M. COLLINS, *Barrister-at-Law.*]

COMMENTARY. The Highway Act, 1835, s. 78, creates a variety of offences. One is where " the driver of any carriage whatsoever on any part of the highway shall by negligence . . . cause any hurt or damage to any person." In *Shears* v. *Matthews* this was the offence charged, and it was held that this provision was aimed at negligence *in driving* and not at a mere casual act of negligence. So the driver of a lorry who, in that case, negligently opened the offside door of his lorry and struck a passing cyclist, was not guilty of the offence. " It would be strange," said Lord Goddard C.J., " if he were regarded as committing an offence, but, if a passenger in the lorry had opened the door, the passenger would not be committing an offence." In *Watson* v. *Lowe* the facts were similar, but the offence charged was, in substance, the same as that in the present case: " . . . if any person shall . . . by negligence . . . interrupt the free passage of any person . . . " The Divisional Court held that the accused was guilty, and that the result in *Shears* v. *Matthews* would have been different if the charge had been under this part of the section.

In some of the offences created by section 78 " the driver " is the subject of the prohibition; in others it is " any person." The most obvious construction to put upon this would be that " any person " includes the driver and anyone else who commits the forbidden act. If the present case is correct, however, it would seem, in the light of the previous cases, that " the driver " means " the driver when acting as such," and " any person " means " the driver whether acting as such or not." This is a truly remarkable result and means that the " strange " case which the Lord Chief Justice foresaw and avoided, by a narrow interpretation in *Shears* v. *Matthews*, is in fact the law under that part of the section before the court in *Watson* v. *Lowe* and the present case.

Summary Trial—*power to commit for trial*

R. *v.* SULEYMAN [17] (Central Criminal Court: The Common Sergeant: October 7, 1957).

The defendants were charged at the magistrates' court with causing grievous bodily harm. The offence is one of those contained in the First Schedule to the Magistrates' Courts Act, 1952, and can, therefore, be tried summarily in accordance with the provisions of section 19 of that Act. The defendants requested summary trial and, accordingly, the charge was written down and in due course the prosecution opened the case. After hearing the opening the magistrate decided to commit the defendants for trial and proceeded to hear the case as examining magistrate.

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[17] For the prosecution: *J. B. R. Hazan* (instructed by the Solicitor, Metropolitan Police). For the defence: *J. O. Haines* (instructed by Arthur W. Kemp, London); *C. P. C. Whelan* (instructed by Director of Public Prosecutions).

(The defendants had originally been charged before the magistrate with causing grievous bodily harm with intent to cause grievous bodily harm, but this was not proceeded with at the lower court. However, in the event, they were indicted for that offence by virtue of the terms of the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2.)

At the trial the defence moved to quash the indictment and also pleaded to the jurisdiction, both on the ground that the committal was bad in that the Magistrates' Courts Act, 1952, s. 19 (5), provides that " . . . the court shall ask him whether he wishes to be tried by a jury or consents to be tried summarily, and, if he consents, *shall* proceed to the summary trial of the information."

The defence further submitted that if that were right, then the offence became a summary offence, and there was consequently no power to prefer a voluntary bill of indictment in respect of it.

The Common Sergeant *held*, (1) following *R.* v. *Craske, ex p. The Commissioner for the Metropolitan Police* [1957] 3 W.L.R. 308 ; [1957] Crim.L.R. 625, that as no evidence had been called in the magistrates' court, the summary trial had not begun ; (2) the magistrate, not having begun summary trial, was free to continue the committal proceedings (*cf*. Magistrates' Courts Act, 1952, s. 24. It was admitted that section 18 of the Act does not apply in the case of the offence of causing grievous bodily harm) ; (3) therefore, the indictment should not be quashed and the court had jurisdiction to try the case.

This case differs from *R.* v. *Craske, supra,* in that there the question was whether the accused could insist on being tried by jury, whereas here the question was whether the accused could insist on being tried summarily.

[M. D. L. WORSLEY, *Barrister-at-Law.*]

COMMENTARY. Section 24 of the Act provides that a magistrates' court, having begun to try an information summarily, shall not thereafter proceed to inquire into the information as examining justices. Section 24 is subject to section 18 (5), which provides that where a court has begun to try summarily an offence which is both an indictable offence and a summary offence, it may discontinue the summary trial and inquire into the information as examining justices, at any time before the conclusion of the evidence for the prosecution. Inflicting grievous bodily harm is an indictable misdemeanour (Offences against the Person Act, 1861, s. 20), and not a summary offence, though, being included in Schedule I of the Magistrates' Courts Act, 1952, it may be tried summarily in accordance with the provisions of section 19 of that Act. Inflicting grievous bodily harm with intent to do grievous bodily harm is a felony (Offences against the Person Act, s. 18) triable only on indictment.

Trial—*Fitness to plead—inability to instruct counsel*

R. *v.* SHARP [18] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Donovan JJ.: October 7, 1957) (*The Times*, October 8, 1957).

S. was convicted at assizes of carnal knowledge of young girls and of other offences against them. On being arraigned at the trial, S. remained silent, and the issue of whether he was mute by malice or by visitation was tried. Medical evidence was called and the jury found him mute by visitation. The issue of fitness to stand trial was then tried and the verdict was that S. was fit to plead. The trial then continued and S. gave evidence by either nodding or dissenting. On application to the Court of Criminal Appeal for leave to appeal, counsel for S. stated that after the trial of the two preliminary issues he (counsel) had applied for the case to be held over to the next assize on the ground that he had wholly inadequate instructions to enable him to present the defence. S. had become unconscious shortly after his arrest and was found to be suffering from hysterical aphonia (involving a lack of capacity to speak), and it was agreed that this condition could be an intermittent one. At the time of the trial S. could neither speak nor write; he merely fingered out words on a piece of paper.

Held, refusing the application, that the judge had no other course, after the jury had found that S. was fit to plead, but to continue the trial. [H. P.]

COMMENTARY. On fitness to plead, see *R.* v. *Sharp* [1957] Crim.L.R. 605, and commentary thereon.

By the Criminal Procedure Act, 1851, if the court, upon the application of the person indicted or otherwise, shall be of opinion that he ought to be allowed a further time, either to prepare for his defence or otherwise, it may adjourn the trial until the next subsequent session. It is not clear why the judge had no other course but to continue the trial. Did he not have a discretion under the above section? And was not temporary inability to instruct counsel a good ground for exercising that discretion?

Under section 6 of the Habeas Corpus Act, 1679, a person committed for trial on a charge of treason or felony must be discharged if he is not tried at the second session of oyer and terminer after his commitment. But there is no indication that this section applied to this case. If the girls were under 13, the offence charged would be a felony under section 5 of the Sexual Offences Act, 1956; if they were between 13 and 16 it would be a misdemeanour under section 6.

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[18] For the applicant: *Bernard Gillis Q.C., W. A. L. Allardice* (instructed by Sharpe, Pritchard & Co., for Hawley and Phoenix, Stoke-on-Trent).

Trial—*Jury's knowledge of previous convictions*

R. *v.* THOMAS [19] (Court of Criminal Appeal: Lord Goddard C.J., Hilbery and Donovan JJ.: October 7 and 21, 1957) (*The Times,* October 8 and 22, 1957).

T. was convicted at assizes of offences of obtaining money by false pretences. During the course of the trial the jury were handed an abstract of the indictment, on the fourth page of which were particulars of T.'s previous convictions. When the attention of the judge was drawn to this fact, he asked the jury to return the document, saying: " You have given it back to me open at p. 3; may I take it you did not turn on to the next page? " The foreman of the jury replied: " I had charge of the document and I did not look at p. 4." Subsequently, T. (who conducted his own defence), having expressed his concern at the information passing, the judge said: " You had better be careful what you say. What is on that sheet is no concern of the jury, and they will never know anything about it until after they have returned their verdict." T. applied to the Court of Criminal Appeal for leave to appeal on the ground that the conversation between the prisoner and the judge must have brought to the attention of the jury that T. had previous convictions.

Held, refusing the application, that it might be that one or more of the jury had suspected that the prisoner had had previous convictions. Each case had, however, to be separately considered. There was, in the present case, an overwhelming case against the prisoner and, accordingly, if the court were to conclude that the jury had suspected from what was said that T. had had previous convictions, they would certainly apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, on the ground that there had been no miscarriage of justice. The application would, therefore, be refused. [H. P.]

COMMENTARY. It is, of course, a fundamental principle of the English criminal law that a jury should not know of the accused's previous convictions (subject to certain exceptions, such as the " similar facts " rule) until they have convicted. The court's attitude in the present case is not easily reconcilable with *R.* v. *Flower* [1957] Crim.L.R.

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[19] For the applicant: *Walter Raeburn Q.C., Henry Harris* (instructed by Lesser & Co.).

118. There, too, there was no more than a suspicion that the jury might have known of the previous convictions (which were entered on the back of the copy of the indictment which the jury took with them when they retired). There, too, the court was " quite sure " that there was no miscarriage of justice—*i.e.*, it was a case in which the proviso to section 4 (1) might have been applied—yet they quashed the conviction.

The court referred, however, to another recent but unreported case, *R.* v. *Vello-Smith* (October 3, 1956) where the court, in similar circumstances, applied the proviso; and to two earlier similar cases, *R.* v. *Williams* (1920) 15 Cr.App.R. 135, and *R.* v. *Lane* (1920) 15 Cr.App.R. 26, in the former of which the proviso was applied and in the latter of which it was not. But in *Lane* the conditions for the application were not fulfilled—*i.e.*, the court thought that the result might have been different if the improper evidence had not been admitted. It is clear that the court has a discretion not to apply the proviso even where the conditions for its application are fulfilled; but it is not clear upon what principles that discretion is exercised.

Warrant—*Indorsement—signature by the magistrate of a different document*

R. *v.* METROPOLITAN POLICE COMMISSIONER, *Ex p.* MELIA[20] (Q.B. Divisional Court: Lord Goddard C.J., Donovan and Havers JJ.: October 2, 17, 1957) ([1957] 1 W.L.R. 1056).

A warrant for the arrest of M. was issued in Dublin. One month later a Metropolitan magistrate purporting to indorse the warrant, signed a form authorising its execution. The form was then attached to the warrant. M. was arrested. It was contended on behalf of M., on an adjourned application for a writ of habeas corpus, that the warrant had never been indorsed, and that M was accordingly illegally detained. Section 12 of the Indictable Offences Act, 1848, as amended, requires the magistrate to indorse such a warrant.

Held, that for a warrant to be indorsed there must be a writing on the back of the warrant; mere writing on another document could not be an indorsement of the warrant. [D. C.]

COMMENTARY. Under section 12 of the Indictable Offences Act, 1848, as amended by the Magistrates' Courts Act, 1952, Fifth Schedule, a warrant issued in Ireland for any offence indictable by the law of Ireland, may be indorsed, in the manner specified, by any magistrate of the county, etc., in England or Wales where the accused person is. The warrant is then sufficient authority for the arrest of the accused person in that county, etc. The section is still in force notwithstanding the establishment of the Republic of Ireland: *R.* v. *Commissioners of Metropolitan Police, ex p. Nalder* [1948] 1 K.B. 251.

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[20] For the applicant: *Henry Harris* (instructed by Joseph Dalton). For the Commissioner of Metropolitan Police: *F. H. Lawton Q.C., W. W. Stabb* (instructed by the Solicitor, Metropolitan Police). For the applicant's wife: *Conolly Gage* (instructed by Hempsons).

Counsel for the Metropolitan Police Commissioner raised the practical point that a certain form of words has to be used in indorsing a warrant, and it would be difficult if they had to be written out. At Bow Street the practice was to paste the form on the back of the warrant. The Lord Chief Justice said that this would be in order, or a rubber stamp with the words on it could be used, and the magistrate could sign over the stamp. In the present case, the paper was attached only with a pin or paper-clip.

Acts and Orders[*]

British Commonwealth

VIRGIN ISLANDS (APPEALS) ORDER IN COUNCIL, 1957 (S.I. No. 1746): operative on dates to be appointed. Provision is made for conferring on the Federal Supreme Court of the Federation established by the West Indies (Federation) Order in Council, 1957 (S.I. 1957, No. 1364), jurisdiction to hear and determine appeals from superior courts of the Virgin Islands. This jurisdiction is to be in substitution for that conferred by the West Indian Court of Appeal Act, 1919 (9 & 10 Geo. 5, c. 47), on the court established by that Act to hear and determine appeals. Provision is also made for certain incidental, consequential and transitional matters.

EAST AFRICAN (APPEAL TO PRIVY COUNCIL) (AMENDMENT) ORDER IN COUNCIL, 1957 (S.I. No. 1749): operative October 15, 1957. The principal Order of 1951 (S.I. 1951, No. 609) is amended (1) so as to increase the minimum amount, or value of the matter in dispute, necessary to found an appeal as of right, for £500 to £1,000 and (2) to enable the Court of Appeal for Eastern Africa, in special cases, to permit the execution of its judgment (where an appeal to the Privy Council is pending) either with a reduced security from the party in whose favour execution is ordered or without any security.

London

The following Order has been made prohibiting waiting: S.I. No. 1790 (Addlestone, Surrey).

LONDON COUNTY COUNCIL (GENERAL POWERS) ACT, 1957 (5 & 6 Eliz. 2, c. xxxv): operative August 31, 1957. Part VII of this Act makes provisions for regulating street trading in London. It is to be construed as one with the London County Council (General Powers) Act, 1947 (10 & 11 Geo. 6, c. xlvi) as if it were inserted in Part IV of that Act. The powers of the London County Council and of the Metropolitan Borough Councils to control and regulate street trading, are amended in certain respects, these powers being subject in certain cases to a right of appeal, by the street trader concerned, to a magistrates' court. Where a borough council considers that a person registered by them under these Acts as a registered street trader is not for any reason capable of exercising or controlling his rights as such a trader, the council may, subject to certain conditions, suspend his registration. Notice of the council's intention to suspend the registration must be given to the street trader who has the right to appeal to a magistrates' court. Any person who, having been so suspended, by wilful misrepresentation procures the restoration of his registration as a street trader is guilty of an offence (s. 65 (8)). Any person found engaging in street trading in or from a stationary position in a street within a borough, or engaging in street trading in a street designated as a street falling within the special provisions of these Acts, must produce his street trader's licence or certificate to (1) a metropolitan police constable or (2) a proper official of the borough council. The council official must, in turn, show his written authority if requested to do so. Any person who fails to comply with this request to show his street trader's licence is guilty of an offence (s. 70).

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[*] Prepared by F. Maurice Drake, Barrister-at-Law.

The penalty for contravention of the provision of the Act by committing an offence under section 65 (8) or section 70 is a maximum fine of £5 for the first offence and £20 for any subsequent offence.

The borough council are also empowered to make by-laws regulating the carrying on of street trading within their borough; but these by-laws are subject to confirmation by the Secretary of State.

Police

POLICE (SCOTLAND) AMENDMENT (NO. 3) REGULATIONS, 1957 (S.I. No. 1781): operative in part with effect from February 1, 1957, and otherwise from or after May 16, 1957. The Valuation and Rating (Scotland) Act, 1956 (section 16 and Schedule 3), provides that as from the local financial year 1957–1958 owner's rates will cease to be payable and rents will be reduced by the amount of owner's rates payable in 1956–1957. These regulations amend the Police (Scotland) Regulations, 1956 (S.I. No. 1999), to provide that, for the purpose of calculating rent allowances, there shall be a corresponding reduction in the rateable value of a house owned and occupied by a member of the police force. These provisions are operative from May 16, 1957, or from the first day of the local financial year commencing thereafter. The regulations also remedy a defect in the rates of pay prescribed for male constables, and this amendment is operative from February 1, 1957.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of subscribers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

39. *Preferment of multiple charges*

We are interested in a prosecution of Mrs. A, who has apparently over a period of time consistently embezzled small amounts of money ranging from £1 to £4 from her employers.

A detailed investigation of the employers' books has shown that during a period of just over eighteen months there have been some 200 separate instances where these comparatively small amounts have been misappropriated by Mrs. A.

We have it in mind that the Court of Criminal Appeal have said on numerous occasions that where there are a number of offences which could be charged as in this case, it will be quite sufficient if a representative selection is made, and prosecution proceeds on those alone.

In this particular case, therefore, we have advised the police to proceed on eight charges spread over the period in question, and which together include a total of some £15 embezzled. It is our intention, when opening the case to the magistrates, to inform them that in accordance with what we understand to be the usual practice selective charges have been preferred only, but that the prosecution could have proved that there were some 200 separate defalcations and that the total amount of money embezzled by Mrs. A is some £300.

It is now understood that although Mrs. A will plead "Guilty" to the eight charges which have been preferred against her, she is not prepared to have the remaining offences taken into consideration when she is dealt with, by way of "Other Offences" forms. The defending solicitor maintains that the prosecution are not at liberty to mention the total amount embezzled, but must confine themselves to the eight occasions only in respect of which charges have been laid.

This seems to be clearly wrong because the magistrates who will hear the case cannot possibly form an accurate impression of what Mrs. A has done and deal with her accordingly unless they know the full story. It is appreciated that it would be possible for 200 separate charges to be preferred against Mrs. A, but this would involve a considerable amount of work by everyone concerned, and would also appear to go quite contrary to the directions which it is our clear recollection have been given by the Lord Chief Justice.

We cannot, however, find any specific reference in any of the Law Reports or in the *Criminal Law Review* to the pronouncements which have been made by the Court of Criminal Appeal, and we should be grateful if you could direct our attention to them, or alternatively let us know whether, in your opinion, we are adopting the usual and correct procedure in a case of this nature, and that we are properly entitled to refer before the justices to the total number of offences and amounts embezzled which could be proved.

We have, of course, very much in mind in advising the police in this case what was said in the Court of Criminal Appeal in *R.* v. *Tomlin* [1954] 2 All E.R. 272; [1954] Crim.L.R. 540. [C. W. C.]

ANSWER

In opening a case before trial the prosecution should not refer to matters which it is not intended to put in evidence; consequently mention should not be made *before conviction* of the other alleged embezzlements, unless it is proposed to give evidence of them to negative accident or mistake. Once there has been a conviction on the eight charges (in this case, presumably by a plea of guilty) the prosecution are entitled to give the court the general background of the case and any information bearing on the character of the accused. At this stage, therefore, mention could properly be made of the total defalcations alleged. If, then, the defence indicate that these are not admitted, the court will not, of course, be able to take them into consideration in passing sentence. When such a situation occurs it is customary for the prosecution to ask for an adjournment in order to prefer such additional charges as the available evidence justifies. It is only in this way that outstanding offences can be cleared up if they are disputed.

I have not been able to trace any case in which any High Court judge has criticised multiple charges when they each referred to separate incidents and were contested. The normal practice is to make a selection, as has been done in this case, because usually the accused will admit the bulk once he has been convicted on the sample. If the defence, in the present case, are merely experimenting with tactics and not genuinely contesting the general body of the charges, they will probably not persist in their attitude when it is made clear that it gives the prosecution no option but to prefer an additional charge in respect of each sum alleged to have been embezzled. [A. E. J.]

Letters to the Editor

Interrogation of Witnesses

Sir,

I noted with interest the problem set out at [1957] Crim.L.R. 701. I thought you might be interested in a Canadian decision on the subject. I quote from a decision of Mr. Justice McRuer Chief Justice (Ontario): " I do not know of any rule that a defence counsel cannot interview a witness that may be called for the Crown. Their names were not on the indictment until yesterday, but because the Crown may call a witness, it does not interfere with counsel for the defence interviewing that witness. The counsel for the defence may not attempt to influence the story that the witness may give. The mere fact that he interviews a witness in preparation of his defence has no effect upon the Crown. The Crown by issuing a lot of subpoenas cannot throw a cloud over a lot of witnesses, excluding the defence from the preparation of the defence of their case." (*R.* v. *Gibbons* (1946) O.R. 477.)

From a practical standpoint the problem has presented some difficulties. On at least two occasions in my experience counsel has asked the witness if he has not on a previous occasion made a certain statement, and on one occasion counsel asked " didn't you tell me last week so and so? " to which the witness answered " No, that is what you wanted me to say." Obviously that answer put counsel in an embarrassing position and it probably did not assist his client's case with the jury.

Yours faithfully,
C. G. SAVAGE, Q.C.

London, Canada.

Books and Periodicals

Reviews:

The English Penal System. By Winifred A. Elkin. Harmondsworth, Middlesex: Penguin Books. 1957. 257 and (bibliography and index) 9 pp. (3s. 6d. net.)

This is an austere book, unflinchingly recording the facts relevant to the English penal system as they are accepted amongst thinking people today. The Preface makes it clear that Miss Elkin is concerned here with the treatment of offenders after conviction. For this purpose treatment is taken to include any sentence imposed by the courts ranging from the absolute or conditional discharge to prison, including the handling of juveniles and the psychiatric treatment and investigation of all classes of offenders. Although the larger part of the book is devoted to prisons (Chapters 5 to 10), about which the author is most knowledgeable, the relatively short section on probation is particularly good. The chapter on the Treatment of Juvenile Offenders shows all the understanding readers have been led to expect from the author of the once standard textbook on juvenile courts.

This is really an introductory textbook to English penology and covers a field which previously required a reference to many books and reports. It is terse and well documented with the relevant authorities. Students of penology and lecturers on this subject will be grateful.

T. E. James

Medical Jurisprudence. Tenth Edition. By John Glaister, J.P., D.SC., M.D., F.R.S.E., F.R.F.P.S. London and Edinburgh: E. & S. Livingstone, Ltd. 1957. xii and 668 and (appendices and index) 52 pp. (47s. 6d. net.)

One of a famous trio of Scottish textbooks on Medical Jurisprudence, which, until a decade ago, monopolised the English market, Professor Glaister's work has enjoyed great popularity, extending into ten editions and a number of revised reprints since first written by his father more than half a century ago. The current vogue of devoting a separate volume to toxicology has been resisted in this edition, largely, so the editor tells us, as a result of representations from overseas doctors, but the book is some pages shorter than its predecessor in spite of this.

Since the "laudatory reviews" of previous editions given on the dust cover include recommendations to the Criminal Bar, a few observations will not be out of place. The sections dealing with substantive and procedural law are of a uniformly low standard. The periodical legal literature is completely ignored and the few isolated references to legal textbooks relate to obsolete editions. Quotations from judgments are often given with no indication of the case, and cases are often given with no indication of where they are to be found, or with references to unofficial reports in scientific journals. For some important observations of the Court of Criminal Appeal in *Hare* [1934] 1 K.B. 354; 24

Cr.App.R. 108 and *Dashwood* [1943] K.B. 1; 28 Cr.App.R. 29, we are directed to the relevant numbers of the *Police Journal*, and for cases such as *Gaskill* v. *Gaskill* [1921] P. 61; *Clark* v. *Clark* [1939] P. 228; *Safford* v. *Safford* [1944] P. 61, and *Wood* v. *Wood* [1947] P. 103, we are referred to the *Lancet* or the *Medical Annual*. There are many other examples of this kind of thing in the book. References to official reports, where given, are often inaccurate or confusing. Unfamiliarity with indispensable works by legal writers renders the sections dealing with abortion, infanticide, sexual offences, insanity, liability of hospitals and professional negligence most disappointing, and important cases such as *Bergmann & Ferguson* and *Roe* v. *Minister of Health* are not mentioned. The Intestate Estates Act, 1952, has passed unnoticed, both in the three pages dealing with the presumption of survivorship (where the important qualifications of section 1 (4) are not mentioned) and in the failure to qualify a reference to the Inheritance (Family Provisions) Act, 1938. The Magistrates' Courts Act, 1952, has also been overlooked, noticeably in the section dealing with dying depositions where it does not appear to have been appreciated that there are alternative procedures. The editor's statement that in charges of incest " the onus of disproving the presumed relationship is thrown on the accused " if it is shown " they must know they were related within the prohibited degrees " requires considerable qualification.

Consistent with companion textbooks on the subject, the law relating to death certification and notification of the coroner is inaccurately stated. The registrar does not have to notify the coroner under the Registration (Births, etc.), Regulations, 1954, reg. 82 (1) (*c*) unless the attending certifying doctor has not seen the deceased after death. Reasonable grounds for suspicion do not entitle the practitioner to withhold a death certificate under the Births and Deaths Registration Act, 1953, ss. 22 (1), 36 (*b*). In recommending that a doctor in doubt about the cause of death should have an " informal conversation " with the coroner, the editor appears to be unaware that such practice will automatically compel the coroner to assume jurisdiction under the Coroners Act, 1887, s. 3 (1). The sections dealing with Scots law seem to have fared little better. Diminished responsibility and inebriety are considered with no mention of *Carraher* (1946) J.C. 108, a very important case on which the later decision of *MacLeod* (1956) J.C. 20 (apparently mentioned by the editor as an afterthought) is based. We are told that the Criminal Law Amendment Act, 1885, s. 11 (still appropriate in Scotland) must be " clearly understood " in relation to alternative charges, but after repeated reading the explanatory passage remains completely unintelligible.

On the whole the sections dealing with forensic pathology and toxicology are sound and easy to understand. Mention might have been made of the folic acid antagonists, now promising to become the most formidable abortifacients yet discovered. The book is printed on good quality paper, the print is excellent, and there are a large number of photographs, many of them in colour. The publishers are to be congratulated on producing the book at such a modest price.

J. D. J. HAVARD.

Books Received:

The Montesi Scandal. By Wayland Young. London: Faber and Faber. 1957. 268 and (index) 9 pp. (18s. net.)

All Rome Trembled. By Melton S. Davis. London: Barrie Books, Ltd. 1957. 237 pp. (12s. 6d. net.)

The Newgate Noose. By Howard Culpin. London: Frederick Muller. 1957. 176 pp. (16s. net.)

Fingerprints: Ruxton Trial Revelations. By George Wilton Wilton. North Berwick: The Tantallon Press. 1957. 29 pp. (7s. 6d. net.)

My Strangest Case. Edited by Kurt Singer. London: W. H. Allen. 1957. 207 pp. (13s. 6d. net.)

Famous American Crimes. By David Rowan. London: Frederick Muller. 1957. 204 pp. (16s. net.)

Prisons I Have Known. By Mary Size. London: Allen and Unwin. 1957. 195 pp. (18s. net.)

Suddenly at the Priory. By John Williams. London: Heinemann & Co. 1957. 297 and (index) 6 pp. (25s. net.)

Personal Identity. By C. H. Rolph. London: Michael Joseph. 1957. 205 pp. (15s. net.)

The English Prison Hulks. By W. Branch-Johnson. London: Christopher Johnson. 1957. 199 and (index) 3 pp. (18s. net.)

Reader's Digest:

Escape: Escape and breach of prison: 121 *Justice of the Peace* 654.

Insanity: Defence of insanity or diminished responsibility: 101 *Solicitors' Journal* 753.

Magistrates' Courts: Remand: 65 *Police Review* 744.

Penology: Borstal allocation: 8 *British Journal of Delinquency* 95.

Possession: Lost property; right of the finder: 65 *Police Review* 760.

Probation: Approved probation homes and hostels: 13 *The Magistrate* 119.

Road traffic: New road traffic laws: 101 *Solicitors' Journal* 768.

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Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter "r" appears in brackets (r) do not roll it. The letter "a" by itself is long, as in bay.]

A fortiori—so much the more so, with greater reason [a for-she-*or*-eye].

Ab initio—from the beginning [ab in-*ish*-ee-oh].

Actus reus—guilty act [*act*-us *ree*-us].

Animus furandi—intent to steal [*an*-imus fure-*and*-eye]. *Animo furandi*—with the intention of stealing [*an*-immo fure-*and*-eye].

Causa causati—an operative cause [cow-zi(r) cow-zar-tee].

Corpus delicti—the body of essential fact constituting a criminal offence [core-pus dee-lick-tie].

Dominus—owner [dom-in-us].

Ejusdem generis—of the same kind or nature. As a rule of construction where particular words are followed by general words, the latter are limited by the particular words [*ee*-juss-dem *gen*-er-iss].

Ex abundanti cautela—from an excess of caution [ex ab-und-*ant*-eye caw-telle(r)].

Ex hypothesi—following from this assumption [ex high-*poth*-ess-eye].

Ex parte—on behalf of [ex *par*-tee].

In absentia—in absence [in ab-*sen*-shee(r)].

In pari delicto—equally at fault [in *pair*-eye dee-*lick*-toe].

In pari materia—in an analogous case [in *pair*-eye mat-*ear*-ea(r)].

In personam—an act, proceeding or right done or directed against or with reference to a specific person [in per-so-nam].

In rem—an act, proceeding or right available against the world at large [in rem].

In specie—in a particular form [in spee-she].

Inter alia—among other things [*in*-ter-*a*-lea(r)].

Invito domino—against the will of the owner [in-vie-toe dom-in-oh].

Ipso facto—by the very fact [*ip*-so-*fact*-oh].

Jus possidendi—right of possessing [juss poss-eye-den-die].

Locus standi—literally "a place of standing"—the right to be heard in court or other proceeding [*lock*-us stand-eye].

Mala in se—acts which are wrong in themselves [ma-le(r) in see].

Mala prohibita—acts which are merely prohibited by law, as opposed to being wrong in themselves [ma-le(r) pro-hib-it-ah].

Men rea—guilty mind [men's rea(r)].

Nemo dat quod non habet—no-one gives who possesses not [nee-mo dat quod non hab-et].

Nolle prosequi—an act of the Attorney-General to stay proceedings [nolly pross-ek-wee].

Obiter—by the way, in passing [*oh*-bitter].

Obiter dictum—a mere saying by the way, a chance remark, which is not binding upon future courts [*oh*-bitter *dick*-tum].

Per quod servitium amisit—literally, "whereby he lost his services." An action for damages lies against any person who commits a tortious act against the servant of another whereby the master is deprived of his services [per quod serve-*it*-ee-um a-my-sit].

Per se—by or in itself [per see].

Quaere—query [query].

Ratio decidendi, rationes decidendi—the reason or ground of a judicial decision [*ray*-she-oh, *ray*-she-oh-ness *dee*-sid-end-eye].

Res judicata—a thing judicially decided [rees jew-dick-a-te(r)].

Res judicata pro veritate accipitur—a thing judicially decided is accepted as true [rees jew-dick-a-te(r) pr-oh very-tay-tee ack-sip-it-err].

Simpliciter—absolutely, without qualification [sim-*pliss*-it-er].

Stare decisis—to abide by authorities or cases already adjudicated upon [*stare*-ee de-*syce*-iss].

Sub judice—under judicial consideration [sub *jew*-diss-ee].

Sub silentio—tacitly [sub sigh-len-shee-oh].

Subpoena duces tecum—a writ commanding a person to attend in court under a penalty and to bring with him certain documents in his possession [sub-*pea*-na *dew*-sez *tee*-cum].

Ultra vires—literally, "beyond the power." An act in excess of the authority conferred by law and therefore invalid [*ull*-tra(r) *vie*-rees].

Vi et armis—by force of arms [vie et *arm*-iss].

Vinculum juris—the bond of the law [vink-you-lum jure-iss].

Volenti non fit injuria—that to which a man consents cannot be considered an injury [voll-*ent*-ee non fit in-*jure*-ee-ah].

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January 1, 1957

Mines and Quarries Act, 1954, operative: see [1955] Crim.L.R. 126.

Army Act, 1955, Air Force Act, 1955, both operative: see [1955] Crim.L.R. 440.

Courts-Martial Appeal (Amendment) Rules, 1955, operative: see [1956] Crim.L.R. 132.

Rules of Procedure (Army), (Air Force), 1956, both operative: see [1956] Crim.L.R. 347.

Field Punishment (Army), (Air Force) Rules, 1956, operative: see [1956] Crim.L.R. 429.

Certificates of Arrest and Surrender of Deserters and Absentees (Army) Regulations, 1956, operative: see [1956] Crim.L.R. 498.

Certificates of Arrest and Surrender of Deserters and Absentees (Air Force) Regulations, 1956, operative: see [1956] Crim.L.R. 429.

Board of Inquiry (Army), (Air Force) Rules. 1956, operative: see [1956] Crim.L.R. 429.

Sugar Act, 1956, partly operative: see [1956] Crim.L.R. 650, 848.

Sexual Offences Act, 1956, operative: [1956] Crim.L.R. 709.

Air Navigation (Fourth Amendment) Order, 1956, operative: see [1956] Crim.L.R. 845.

Air Navigation (Minimum Height of Helicopters) Regulations, 1956, operative: see [1956] Crim.L.R. 846.

Medical Act, 1956, operative: see [1957] Crim.L.R. 65.

January 27, 1957

Sale of Food (Weights and Measures: Bacon and Ham) Regulations, 1956, operative: see [1956] Crim.L.R. 704.

Pre-packed Food (Weights and Measures: Marking) (Amendment No. 2) Regulations, 1956, operative: [1956] Crim.L.R. 704.

WINTER ASSIZES, 1957

First Working Days

South Eastern Circuit (Hallett and Donovan JJ.)

January	*February*	*March*	*April*
17: Huntingdon	5: Ipswich	12: Kingston	2: Lewes
22: Hertford	12: Norwich	19: Maidstone	
29: Cambridge	26: Chelmsford		

Wales and Chester Circuit (Byrne, Slade and Sachs JJ.)

January	*February*	*March*
15: Welshpool	6: Mold	5: Lampeter
18: Dolgelley	12: Chester	8: Haverfordwest
22: Caernarvon	26: Presteign	13: Carmarthen
29: Beaumaris	28: Brecon	19: Cardiff
31: Ruthin		

Western Circuit (Lynskey, Jones and Willmer JJ.)

January	*February*	*March*
14: Devizes	5: Bodmin	12: Winchester
22: Dorchester	12: Exeter	
29: Taunton	26: Bristol	

Northern Circuit (Streatfeild, Havers, Davies and Glyn-Jones JJ.)

January	*February*	*March*
15: Appleby	6: Liverpool	5: Manchester
17: Carlisle		
24: Lancaster		

Oxford Circuit (Hilbery and Barry JJ.)

January	*February*	*March*
14: Reading	5: Gloucester	1: Shrewsbury
22: Oxford	14: Newport	8: Stafford
29: Worcester	25: Hereford	19: Birmingham

Midland Circuit (Barnard, Finnemore and Pearce JJ.)

January	*February*	*March*
14: Aylesbury	9: Oakham	12: Warwick
18: Bedford	12: Lincoln	19: Birmingham
24: Northampton	19: Derby	
31: Leicester	26: Nottingham	

North Eastern Circuit (Oliver, Cassels, Wallington and Diplock JJ.)

January	*February*	*March*
15: Newcastle	19: York	5: Sheffield
29: Durham		19: Leeds

CENTRAL CRIMINAL COURT, 1957

First Working Days

January 8, 29 February 19

County Quarter Sessions, 1957

January and February

	January
Bedfordshire	2
Caernarvonshire	3
Cambridgeshire	4
Cardiganshire	3
Carmarthenshire	4
Cheshire (Chester)	15
Cheshire (Knutsford)	21
Cornwall	1
Denbighshire	4
Derbyshire	2
Dorset	2
Essex	2
Essex (Appeals)	10
Essex	30
Flintshire	10
Glamorganshire (Cardiff)	1
Hereford	7
Hertfordshire (Hertford)	7
Hertfordshire (Appeals: Hertford)	8

	January
Isle of Wight	9
Kent, West	7
Lincolnshire (Holland: Boston)	7
Lincolnshire (Kesteven: Bourne)	3
Lincolnshire (Lindsey)	17
Merionethshire (Dolgelley)	1
Montgomeryshire	3
Norfolk (Norwich)	2
Norfolk (King's Lynn)	9
Nottinghamshire (Nottingham)	7
Oxfordshire	1
Pembrokeshire	7
Peterborough, Soke of	10
Shropshire	2
Suffolk, West	1
Warwickshire	8
Westmorland	4
Wiltshire (Devizes)	2
Worcestershire	9
Yorkshire, West Riding	7

	February
Essex (Appeals)	7
Essex	27
Hertfordshire (St. Albans)	11
Hertfordshire (Appeals: St. Albans)	12

	February
Kent, East	4
Kent, West	11
Nottinghamshire (East Retford)	18
Pembrokeshire	11

Borough Quarter Sessions, 1957

January and February

	January
Bradford	2
Bridgwater	18
Burnley	7
Bury St. Edmunds	18
Canterbury	19
Cardiff	7
Coventry	7
Croydon	4
Deal	4
Derby	3
Dover	3
Folkestone	5
Grantham	10
Gravesend	10
Maidstone	18

	January
Margate	10
Newark	22
Newcastle-under-Lyme	15
Oldham	2
Plymouth	15
Rochester	14
Salford	8
Salisbury	4
Sheffield	8
Shrewsbury	16
Southend-on-Sea	7
Swansea	2
Wigan	3
Winchester	9

	February
Andover	5

	February
Birkenhead	4

Magistrates' Courts

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Calendar

WINTER ASSIZES, 1957

First Working Days

South Eastern Circuit (Hallett and Donovan JJ.)

February	*March*	*April*
5: Ipswich	12: Kingston	2: Lewes
12: Norwich	19: Maidstone	
26: Chelmsford		

Wales and Chester Circuit (Byrne, Slade and Sachs JJ.)

February	*March*
6: Mold	5: Lampeter
12: Chester	8: Haverfordwest
26: Presteign	13: Carmarthen
28: Brecon	19: Cardiff

Western Circuit (Lynskey, Jones and Willmer JJ.)

February	*March*
5: Bodmin	12: Winchester
12: Exeter	
26: Bristol	

Northern Circuit (Streatfeild, Havers, Davies and Glyn-Jones JJ.)

February	*March*
6: Liverpool	5: Manchester

Oxford Circuit (Hilbery and Barry JJ.)

February	*March*
5: Gloucester	1: Shrewsbury
14: Newport	8: Stafford
25: Hereford	19: Birmingham

Midland Circuit (Barnard, Finnemore and Pearce JJ.)

February	*March*
9: Oakham	12: Warwick
12: Lincoln	19: Birmingham
19: Derby	
26: Nottingham	

North Eastern Circuit (Oliver, Cassels, Wallington and Diplock JJ.)

February	*March*
19: York	5: Sheffield
	19: Leeds

CENTRAL CRIMINAL COURT, 1957

First Working Days

February 19 March 12

COUNTY QUARTER SESSIONS, 1957

February and March

	February		February
Essex (Appeals)	7	Kent, East	4
Essex	20	Kent, West	11
Hertfordshire (St. Albans)	11	Nottinghamshire (East Retford)	18
Hertfordshire (Appeals: St. Albans)	12	Pembrokeshire	11

	March		March
Anglesey	12	Lincolnshire (Kesteven: Sleaford)	28
Bedfordshire	27	Lincolnshire (Lindsey)	7
Essex (Appeals)	14	Northamptonshire	14
Essex	27	Wiltshire (Salisbury)	27
Gloucestershire	20	Yorkshire, East Riding	26
Leicestershire	11	Yorkshire, West Riding	11

BOROUGH QUARTER SESSIONS, 1957

February and March

	February		February
Andover	5	Hereford	1
Birkenhead	4	Maidstone	15
Hastings	4	Oxford	15

	March		March
Abingdon	7	Poole	20
Canterbury	30	Southend-on-Sea	11
Croydon	1		

Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter " r " appears in brackets (r) do not roll it. The letter " a " by itself is long, as in bay.]

Ab initio—from the beginning [ab in-*ish*-ee-oh].
Animo furandi—with the intention of stealing [*an*-immo fure-*and*-eye].
Consensus ad idem—agreement as to the same thing [con-sense-us ad id-dem].
De facto—in fact, whether by right or not [dee *fact*-oh].
Dominus—owner [dom-in-us].
Ex parte—on behalf of [ex *par*-tee].
In pari materia—in an analogous case [in *pair*-eye mat-*ear*-ea(r)].
Ipso facto—by the very fact [*ip*-so *fact*-oh].
Jus possidendi—right of possessing [juss poss-eye-den-die].
Per quod servitium amisit—literally, " whereby he lost his services." An action for damages lies against any person who commits a tortious act against the servant of another whereby the master is deprived of his services [per quod serve-*it*-ee-um a-my-sit].
Quaere—query [query].
Sub judice—under judicial consideration [sub *jew*-diss-ee].
Vinculum juris—the bond of the law [vink-you-lum jure-iss].

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Animo furandi—with the intention of stealing [*an*-immo fure-*and*-eye].
In pari delicto—equally at fault [in *pair*-eye dee-*lick*-toe].
Mens rea—guilty mind [men's rea(r)].
Simpliciter—absolutely, without qualification [sim-*pliss*-it-er].

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APPOINTED DAYS

March 1, 1957

Road Traffic Act, 1956, operative in part: see [1957] Crim.L.R. 202.

WINTER ASSIZES, 1957

First Working Days

South Eastern Circuit (Hallett and Donovan JJ.)

March	*April*
12: Kingston	2: Lewes
19: Maidstone	

Wales and Chester Circuit (Byrne, Slade and Sachs JJ.)

March

5: Lampeter
8: Haverfordwest
13: Carmarthen
19: Cardiff

Western Circuit (Lynskey, Jones and Willmer JJ.)

March

12: Winchester

Northern Circuit (Streatfeild, Havers, Davies and Glyn-Jones JJ.)

March

5: Manchester

Oxford Circuit (Hilbery and Barry JJ.)

March

1: Shrewsbury
8: Stafford
19: Birmingham

Midland Circuit (Barnard, Finnemore and Pearce JJ.)

March

12: Warwick
19: Birmingham

North Eastern Circuit (Oliver, Cassels, Wallington and Diplock JJ.)

March

5: Sheffield
19: Leeds

CENTRAL CRIMINAL COURT, 1957

First Working Days

March 12	April 2

COUNTY QUARTER SESSIONS, 1957

March and April

	March
Anglesey	12
Bedfordshire	27
Essex (Appeals)	14
Essex	27
Gloucestershire	20
Leicestershire	11

	March
Lincolnshire (Kesteven: Sleaford)	28
Lincolnshire (Lindsey)	7
Northamptonshire	14
Wiltshire (Salisbury)	27
Yorkshire, East Riding	26
Yorkshire, West Riding	11

	April
Berkshire	8
Buckinghamshire	1
Caernarvonshire	4
Cambridgeshire	5
Cardiganshire	4
Carmarthenshire	12
Cheshire (Knutsford)	9
Cheshire (Chester)	15
Cornwall	9
Denbighshire	5
Derbyshire	3
Dorset	3
Essex (Appeals)	18
Flintshire	4
Glamorganshire (Swansea)	2
Herefordshire	1
Hertfordshire (St. Albans)	1
Hertfordshire (Appeals: St. Albans)	2
Huntingdonshire	2

	April
Isle of Wight	10
Kent, East	1
Kent, West	8
Lincolnshire (Holland: Spalding)	4
Merionethshire (Bala)	2
Montgomeryshire	4
Norfolk (Norwich)	3
Norfolk (King's Lynn)	10
Nottinghamshire (Nottingham)	1
Oxfordshire	2
Pembrokeshire	1
Peterborough, Soke of	11
Rutland	8
Shropshire	3
Suffolk, West	9
Warwickshire	2
Westmorland	5
Worcestershire	10

BOROUGH QUARTER SESSIONS, 1957

March and April

	March
Abingdon	7
Canterbury	30
Croydon	1
Lichfield	25

	March
Poole	20
Southend-on-Sea	11
Walsall	21
West Bromwich	28

	April
Bridgwater	26
Cardiff	24
Croydon	12
Deal	26
Dover	17
Folkestone	13

	April
Gravesend	25
Margate	30
Newark	16
Rochester	15
Salisbury	24
Swansea	15

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Calendar

Appointed Days

April 1, 1957

Road Traffic Act, 1956, operative in part: see [1957] Crim.L.R. 202, 264.

Approved Schools (Contributions by Local Authorities) Regulations, 1957, operative: see [1957] Crim.L.R. 261.

Spring Assizes

First Working Days

North Eastern Circuit (Havers, Davies and Glyn-Jones JJ.)
April 24: Leeds

Northern Circuit (Oliver, Karminski, Hinchcliffe JJ.)
April 2: Liverpool
April 24: Manchester

Central Criminal Court, 1957

First Working Days

April 2
May 7

County Quarter Sessions, 1957

April and May

	April
Berkshire	8
Buckinghamshire	1
Caernarvonshire	4
Cambridgeshire	5
Cardiganshire	4
Carmarthenshire	12
Cheshire (Knutsford)	9
Cheshire (Chester)	15
Cornwall	9
Denbighshire	5
Derbyshire	3
Dorset	3
Essex (Appeals)	18
Flintshire	4
Glamorganshire (Swansea)	2
Herefordshire	1
Hertfordshire (St. Albans)	1
Hertfordshire (Appeals: St. Albans)	2
Huntingdonshire	2

	April
Isle of Wight	10
Kent, East	1
Kent, West	8
Lincolnshire (Holland: Spalding)	4
Merionethshire (Bala)	2
Montgomeryshire	4
Norfolk (Norwich)	3
Norfolk (King's Lynn)	10
Nottinghamshire (Nottingham)	1
Oxfordshire	2
Pembrokeshire	1
Peterborough, Soke of	11
Rutland	8
Shropshire	3
Suffolk, West	9
Warwickshire	2
Westmorland	5
Worcestershire	10

	May
Essex	1
Essex (Appeals)	16
Essex	29
Hertfordshire (Hertford)	6
Hertfordshire (Appeals: Hertford)	7

	May
Kent, East	13
Kent, West	27
Lincolnshire (Lindsey)	3
Nottinghamshire (Newark)	13
Pembrokeshire	13

BOROUGH QUARTER SESSIONS, 1957

April and May

	April		April
Birkenhead	29	Middlesbrough	15
Blackburn	9	Newark	16
Bradford	9	Newcastle-under-Lyme	12
Bridgwater	26	Oldham	23
Burnley	1	Plymouth	15
Cardiff	24	Reading	10
Croydon	12	Rochester	15
Deal	26	Rotherham	8
Derby	8	Salisbury	24
Dover	17	Sheffield	9
Folkestone	13	Sunderland	10
Gravesend	25	Swansea	15
Margate	30	Wigan	16

	May		May
Andover	14	Hereford	24
Bury St. Edmunds	3	Maidstone	3
Croydon	31	Southend-on-Sea	13
Dudley	30	Winchester	10

Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter "r" appears in brackets (r) do not roll it. The letter "a" by itself is long, as in bay.]

Ipso facto—by the very fact [*ip*-so *fact*-oh].

Mala in se—acts which are wrong in themselves [ma-le(r) in see].

Mala prohibita—acts which are merely prohibited by law, as opposed to being wrong in themselves [ma-le(r) pro-hib-it-ah].

Mens rea—guilty mind [men's rea(r)].

Obiter dictum—a mere saying by the way, a chance remark, which is not binding upon future courts [*oh*-bitter *dick*-tum].

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Calendar

Appointed Days

May 1, 1957

Importation of Horses, Asses and Mules Order, 1957, operative: see p. 329, below.

Air Navigation (Fifth Amendment) Order, 1957, operative: see p. 331, below.

Motor Vehicles (Variation of Speed Limit) Regulations, 1956, operative: see p. 338, below.

Wireless Telegraphy (Control of Interference) Amendment (No. 1) Regulations, 1957, operative: see p. 339, below.

May 27, 1957

Public Analysts Regulations, 1957, operative: see p. 332, below.

Summer Assizes

First Working Days

South Eastern Circuit (Stable and Pilcher JJ.)

May	*June*	*July*
10: Huntingdon	4: Norwich	2: Kingston
14: Hertford	18: Chelmsford	9: Maidstone
21: Cambridge		18: Lewes
28: Bury St. Edmunds		

Wales and Chester Circuit (Oliver, Wallington and Jones JJ.)

May	*June*	*July*
7: Welshpool	14: Presteign	3: Swansea
10: Dolgelley	17: Brecon	
14: Caernarvon	20: Lampeter	
20: Beaumaris	24: Haverfordwest	
22: Ruthin	27: Carmarthen	
27: Mold		
30: Chester		

Western Circuit (Cassels, Streatfeild and Sachs JJ.)

May	*June*	*July*
7: Salisbury	4: Exeter	2: Winchester
14: Dorchester	18: Bristol	
21: Wells		
28: Bodmin		

Northern Circuit (Barnard, Hinchcliffe and Paull JJ.)

May	*June*	*July*
18: Appleby	4: Liverpool	2: Manchester
21: Carlisle		
28: Lancaster		

Oxford Circuit (Pearce and Diplock JJ.)

April	*May*	*June*	*July*
30: Reading	7: Oxford	12: Hereford	9: Birmingham
	14: Worcester	18: Shrewsbury	
	21: Gloucester	25: Stafford	
	30: Newport		

Midland Circuit (Hallett, Lynskey and Willmer JJ.)

May	*June*	*July*
6: Aylesbury	1: Oakham	2: Warwick
9: Bedford	4: Lincoln	9: Birmingham
16: Northampton	14: Derby	
23: Leicester	21: Nottingham	

Norh Eastern Circuit (Collingwood, Barry, Donovan and Ashworth JJ.)

May	*June*	*July*
14: Newcastle	12: York	9: Leeds
28: Durham	25: Sheffield	

Central Criminal Court, 1957

First Working Days

May 7 June 18

County Quarter Sessions, 1957

May and June

	May		May
Essex	1	Kent, East	13
Essex (Appeals)	16	Kent, West	27
Essex	29	Lincolnshire (Lindsey)	3
Hertfordshire (Hertford)	6	Nottinghamshire (Newark)	13
Hertfordshire (Appeals: Hertford)	7	Pembrokeshire	13

	June		June
Anglesey	18	Leicestershire	17
Bedfordshire	19	Lincolnshire (Holland: Boston)	24
Caernarvonshire	27	Norfolk (Norwich)	26
Cheshire (Chester)	26	Northamptonshire	13
Cornwall	25	Nottinghamshire (Nottingham)	17
Derbyshire	26	Rutland	12
Essex (Appeals)	13	Suffolk, West	25
Glamorganshire (Cardiff)	25	Warwickshire	25
Gloucestershire	26	Yorkshire, East Riding	4
Isle of Wight	12	Yorkshire, West Riding	24

Borough Quarter Sessions, 1957

May and June

	May		May
Andover	14	Kingston upon Hull	6
Bury St. Edmunds	3	Maidstone	3
Croydon	31	Oxford	24
Dudley	30	Southend-on-Sea	13
Hereford	24	Winchester	10

	June		June
Abingdon	6	Poole	26
Deal	28	Rochester	17

Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter " r " appears in brackets (r) do not roll it. The letter " a " by itself is long, as in bay.]

A fortiori—so much the more so, with greater reason [a for-she-*or*-eye].
Actus reus—guilty act [*act*-us *ree*-us].
Corpus delicti—the body of essential fact constituting a criminal offence [core-pus dee-lick-tie].
Ejusdem generis—of the same kind or nature [*ee*-juss-dem *gen*-er-iss].
Ex necessitate—necessarily [ex ne-sess-ee-tay-tee].
In personam—an act, proceeding or right done or directed against or with reference to a specific person [in per-so-nam].
Ipso facto—by the very fact [*ip*-so *fact*-oh].
Mala in se—acts which are wrong in themselves [ma-le(r) in see].
Mala prohibita—acts which are merely prohibited by law, as opposed to being wrong in themselves [ma-le(r) pro-hib-it-ah].
Mens rea—guilty mind [men's rea(r)].
Nemo dat quod non habet—no one gives who possesses not [nee-mo dat quod non hab-et].
Subpoena duces tecum—a writ commanding a person to attend in court under a penalty and to bring with him certain documents in his possession [sub-*pea*-na *dew*-sez *tee*-come].

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APPOINTED DAYS

June 1, 1957

Diseases of Animals (Waste Foods) Order, 1957, operative: see p. 410 below.

SUMMER ASSIZES

First Working Days

South Eastern Circuit (Stable and Pilcher JJ.)

June
4: Norwich
18: Chelmsford

July
2: Kingston
9: Maidstone
18: Lewes

Wales and Chester Circuit (Oliver, Wallington and Jones JJ.)

June
14: Presteign
17: Brecon
20: Lampeter
24: Haverfordwest
27: Carmarthen

July
3: Swansea

Western Circuit (Cassels, Streatfeild and Sachs JJ.)

June
4: Exeter
18: Bristol

July
2: Winchester

Northern Circuit (Barnard, Hinchcliffe and Paull JJ.)

June
4: Liverpool

July
2: Manchester

Oxford Circuit (Pearce and Diplock JJ.)

June
12: Hereford
18: Shrewsbury
25: Stafford

July
9: Birmingham

Midland Circuit (Hallett, Lynskey and Willmer JJ.)

June
1: Oakham
4: Lincoln
14: Derby
21: Nottingham

July
2: Warwick
9: Birmingham

North Eastern Circuit (Collingwood, Barry, Donovan and Ashworth JJ.)

June
12: York
25: Sheffield

July
9: Leeds

CENTRAL CRIMINAL COURT, 1957

First Working Days

June 18 July 9

COUNTY QUARTER SESSIONS, 1957

June and July

	June
Anglesey	18
Bedfordshire	19
Caernarvonshire	27
Cheshire (Chester)	26
Cornwall	25
Derbyshire	26
Essex (Appeals)	13
Glamorganshire (Cardiff)	25
Gloucestershire	26
Isle of Wight	12
	July
Berkshire	1
Buckinghamshire	1
Cambridgeshire	5
Cardiganshire	4
Carmarthenshire	12
Cheshire (Knutsford)	1
Denbighshire	5
Dorset	3
Essex	2, 30
Essex (Apps.)	25
Flintshire	11
Herefordshire	1
Hertfordshire (Hertford)	1
Hertfordshire (Apps.: Hertford)	2
Hertfordshire (St. Albans)	29
Hertfordshire (Apps.: St. Albans)	30
Huntingdonshire	2

	June
Leicestershire	17
Lincolnshire (Holland: Boston)	24
Norfolk (Norwich)	26
Northamptonshire	13
Nottinghamshire (Nottingham)	17
Rutland	12
Suffolk, West	25
Warwickshire	25
Yorkshire, East Riding	4
Yorkshire, West Riding	24
	July
Kent, East	1
Kent, West	22
Lincolnshire (Kesteven; Stanford)	9
Lincolnshire (Lindsey)	4
Merionethshire (Bala)	2
Montgomeryshire	4
Norfolk (King's Lynn)	10
Nottinghamshire (East Retford)	29
Oxfordshire	2
Pembrokeshire	1
Peterborough, Soke of,	11
Shropshire	3
Westmorland	5
Wiltshire (Warminster)	3
Worcestershire	5

BOROUGH QUARTER SESSIONS, 1957

June and July

	June
Abingdon	6
Deal	28
Hastings	6
Newark	17
	July
Andover	16
Bedford	1
Bridgwater	19
Bury St. Edmunds	19
Canterbury	6
Cardiff	31

	June
Poole	26
Rochester	17
Shrewsbury	5
West Bromwich	17
	July
Croydon	19
Dover	8
Folkestone	6
Gravesend	11
Southend-on-Sea	15
Swansea	24

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July
2: Kingston
9: Maidstone
18: Lewes

Wales and Chester Circuit (Oliver, Wallington and Jones JJ.)
July
3: Swansea

Western Circuit (Cassels, Streatfeild and Sachs JJ.)
July
2: Winchester

Northern Circuit (Barnard, Hinchcliffe and Paull JJ.)
July
2: Manchester

Oxford Circuit (Pearce and Diplock JJ.)
July
9: Birmingham

Midland Circuit (Hallett, Lynskey and Willmer JJ.)
July
2: Warwick
9: Birmingham

North Eastern Circuit (Collingwood, Barry, Donovan and Ashworth JJ.)
July
9: Leeds

CENTRAL CRIMINAL COURT, 1957

First Working Day

July 9

CALENDAR

County Quarter Sessions, 1957

July and August

	July
Berkshire	1
Buckinghamshire	1
Cambridgeshire	5
Cardiganshire	4
Carmarthenshire	12
Cheshire (Knutsford)	1
Denbighshire	5
Dorset	3
Essex	2, 30
Essex (Apps.)	25
Flintshire	11
Herefordshire	1
Hertfordshire (Hertford)	1
Hertfordshire (Apps.: Hertford)	2
Hertfordshire (St. Albans)	29
Hertfordshire (Apps.: St. Albans)	30
Huntingdonshire	2
	August
Essex (Apps.)	29
Kent, East	26

	July
Kent, East	1
Kent, West	22
Lincolnshire (Kesteven; Stamford)	9
Lincolnshire (Lindsey)	4
Merionethshire (Dolgelly)	2
Montgomeryshire	4
Norfolk (King's Lynn)	10
Nottinghamshire (East Retford)	29
Oxfordshire	2
Pembrokeshire	1
Peterborough, Soke of,	11
Shropshire	3
Westmorland	5
Wiltshire (Warminster)	3
Worcestershire	10
	August
Pembrokeshire	12

Borough Quarter Sessions, 1957

July and August

	July
Andover	16
Bedford	1
Birkenhead	15
Blackburn	9
Bridgwater	19
Bury St. Edmunds	19
Canterbury	6
Cardiff	31
Croydon	19
Dover	8
Folkestone	6
Grantham	26
	August
Maidstone	2
Margate	1

	July
Gravesend	11
Halifax	1
Middlesbrough	15
New Sarum	5
Plymouth	30
Reading	10
Rotherham	8
Southend-on-Sea	15
Sunderland	3
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Walsall	11
	August
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Agriculture (First Aid) Regulations, 1957, operative: see [1957] Crim.L.R. 546.

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First Working Days

South Eastern Circuit (Hilbery and Paull JJ.)

October

2: Hertford
8: Cambridge
15: Bury St. Edmunds
22: Norwich

November

5: Chelmsford
19: Kingston
26: Maidstone

December

6: Lewes

Wales and Chester Circuit (Cassels, Finnemore and Karminski JJ.)

October

3: Caernarvon
10: Ruthin
17: Chester

November

6: Brecon
11: Carmarthen
19: Cardiff

Western Circuit (Hallett, Sachs and Salmon JJ.)

October

2: Devizes
9: Dorchester
15: Taunton
22: Bodmin
30: Exeter

November

12: Bristol
26: Winchester

Northern Circuit (Wallington, Lynskey, Gorman and McNair JJ.)

October

8: Carlisle
17: Lancaster
29: Liverpool

November

19: Manchester

Oxford Circuit (Stable and Hinchcliffe JJ.)

October

2: Reading
9: Oxford
16: Worcester
23: Gloucester
31: Newport

November

12: Hereford
19: Shrewsbury
26: Stafford

December

3: Birmingham

Midland Circuit (Hallett, Lynskey and Willmer JJ.)

May	*June*	*July*
6: Aylesbury	1: Oakham	2: Warwick
9: Bedford	4: Lincoln	9: Birmingham
16: Northampton	14: Derby	
23: Leicester	21: Nottingham	

Norh Eastern Circuit (Collingwood, Barry, Donovan and Ashworth JJ.)

May	*June*	*July*
14: Newcastle	12: York	9: Leeds
28: Durham	25: Sheffield	

CENTRAL CRIMINAL COURT, 1957

First Working Days

May 7	June 18

COUNTY QUARTER SESSIONS, 1957

May and June

	May		May
Essex	1	Kent, East	13
Essex (Appeals)	16	Kent, West	27
Essex	29	Lincolnshire (Lindsey)	3
Hertfordshire (Hertford)	6	Nottinghamshire (Newark)	13
Hertfordshire (Appeals: Hertford)	7	Pembrokeshire	13

	June		June
Anglesey	18	Leicestershire	17
Bedfordshire	19	Lincolnshire (Holland: Boston)	24
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Cheshire (Chester)	26	Northamptonshire	13
Cornwall	25	Nottinghamshire (Nottingham)	17
Derbyshire	26	Rutland	12
Essex (Appeals)	13	Suffolk, West	25
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Gloucestershire	26	Yorkshire, East Riding	4
Isle of Wight	12	Yorkshire, West Riding	24

BOROUGH QUARTER SESSIONS, 1957

May and June

	May		May
Andover	14	Kingston upon Hull	6
Bury St. Edmunds	3	Maidstone	3
Croydon	31	Oxford	24
Dudley	30	Southend-on-Sea	13
Hereford	24	Winchester	10

	June		June
Abingdon	6	Poole	26
Deal	28	Rochester	17

Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter "r" appears in brackets (r) do not roll it. The letter "a" by itself is long, as in bay.]

A fortiori—so much the more so, with greater reason [a for-she-*or*-eye].

Actus reus—guilty act [*act*-us *ree*-us].

Causa causati—an operative cause [cow-ze(r) cow-zar-tee].

Corpus delicti—the body of essential fact constituting a criminal offence [core-pus dee-lick-tie].

Inter alia—among other things [*in*-ter *a*-lea(r)].

Mens rea—guilty mind [men's rea(r)].

Per se—by or in itself [per see].

Volenti non fit injuria—that to which a man consents cannot be considered an injury [voll-*ent*-ee known fit in-jure-ee-ah].

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Glossary

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Actus reus—guilty act [*act*-us *ree*-us].

Animus—intent; *animus furandi*—intent to steal [*an*-imus fure-*and*-eye].

In pari materia—in an analogous case [in *pair*-eye mat-*ear*-ea(r)].

Invito domino—against the will of the owner [in-vie-toe dom-in-oh].

Mens rea—guilty mind [men's rea(r)].

Vi et armis—by force of arms [vie et *arm*-iss].

Calendar

APPOINTED DAYS

September 6, 1957
Dentists Act.
Magistrates' Courts Act, ss. 1–3.

AUTUMN ASSIZES

First Working Days

South Eastern Circuit (Hilbery and Paull JJ.)

October	*November*	*December*
2: Hertford	5: Chelmsford	6: Lewes
8: Cambridge	19: Kingston	
15: Bury St. Edmunds	26: Maidstone	
22: Norwich		

Wales and Chester Circuit (Cassels, Finnemore and Karminski JJ.)

October	*November*
3: Caernarvon	6: Brecon
10: Ruthin	11: Carmarthen
17: Chester	19: Cardiff

Western Circuit (Hallett, Sachs and Salmon JJ.)

October	*November*
2: Devizes	12: Bristol
9: Dorchester	26: Winchester
15: Taunton	
22: Bodmin	
30: Exeter	

Northern Circuit (Wallington, Lynskey, Gorman and McNair JJ.)

October	*November*
8: Carlisle	19: Manchester
17: Lancaster	
29: Liverpool	

Oxford Circuit (Stable and Hinchcliffe JJ.)

October	*November*	*December*
2: Reading	12: Hereford	3: Birmingham
9: Oxford	19: Shrewsbury	
16: Worcester	26: Stafford	
23: Gloucester		
31: Newport		

Midland Circuit (Oliver, Jones and Davies JJ.)

October	*November*	*December*
2: Aylesbury	7: Derby	3: Birmingham
8: Bedford	14: Nottingham	
15: Northampton	26: Warwick	
22: Leicester		
30: Lincoln		

North Eastern Circuit (Barnard, Byrne, Streatfeild and Slade JJ.)

October	*November*	*December*
8: Newcastle	7: York	3: Leeds
22: Durham	19: Sheffield	

CENTRAL CRIMINAL COURT, 1957

First Working Day

September 10

COUNTY QUARTER SESSIONS, 1957

September and October

	September
Anglesey	17
Berkshire	30
Caernarvonshire	19
Cornwall	24
Derbyshire	25
Essex	4
Essex (Appeals)	26
Flintshire	26
Gloucestershire	18
Kent, West	9
Lincolnshire (Lindsey)	12

	September
Merionethshire (Dolgelly)	24
Montgomeryshire	26
Norfolk (Norwich)	25
Northamptonshire	26
Rutland	23
Shropshire	25
Suffolk, West	24
Warwickshire	24
Wiltshire (Marlborough)	25
Yorkshire, East Riding	17

	October
Cambridgeshire	4
Cardiganshire	3
Carmarthenshire	4
Cheshire (Chester)	7
Cheshire (Knutsford)	1
Denbighshire	4
Dorset	2
Essex	2, 29
Essex (Appeals)	24
Glamorganshire (Swansea)	1
Herefordshire	7
Hertfordshire (St. Albans)	7
Hertfordshire (St. Albans: Appeals)	8
Huntingdonshire	1
Isle of Wight	2

	October
Kent, East	7
Kent, West	21
Leicestershire	14
Lincolnshire (Holland: Spalding)	3
Lincolnshire (Kesteven: Sleaford)	17
Norfolk (King's Lynn)	2
Nottinghamshire (Nottingham)	7
Oxfordshire	1
Pembrokeshire	7
Peterborough, Soke of	10
Westmorland	4
Worcestershire	2
Yorkshire, West Riding	7

BOROUGH QUARTER SESSIONS, 1957

	September
Abingdon	12
Bedford	23
Bradford	16
Cardiff	23
Croydon	20
Deal	27
Dover	26
Dudley	17
Gravesend	26

	September
Hereford	4
Lincoln	24
Poole	25
Rochester	23
Southend-on-Sea	16
Sunderland	10
West Bromwich	27
Worcester	11

	October
Bridgwater	18
Bury St. Edmunds	18
Canterbury	5
Croydon	18

	October
Folkestone	5
Margate	29
Newark	10

Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter "r" appears in brackets (r) do not roll it. The letter "a" by itself is long, as in bay.]

Actus reus—guilty act [*act*-us *ree*-us].

Animus furandi—intent to steal [*an*-imus fure-*and*-eye].

Inter alia—among other things [*in*-ter *a*-lea(r)].

Mens rea—guilty mind [men's rea(r)].

Obiter dicta—chance remarks, remarks which are not binding on the court [*oh*-bitter *dick*-tah].

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October 1, 1957

Criminal Justice (Scotland) Act, 1949 (Commencement No. 3) Order, 1957.

Spirits Certificate Regulations, 1957.

October 7, 1957

Merchant Shipping (Seamen's Provisions) Order, 1957.

Autumn Assizes

First Working Days

South Eastern Circuit (Hilbery and Paull JJ.)

October	*November*	*December*
2: Hertford	5: Chelmsford	6: Lewes
8: Cambridge	19: Kingston	
15: Bury St. Edmunds	26: Maidstone	
22: Norwich		

Wales and Chester Circuit (Cassels, Finnemore and Karminski JJ.)

October	*November*
3: Caernarvon	6: Brecon
10: Ruthin	11: Carmarthen
17: Chester	19: Cardiff

Western Circuit (Hallett, Sachs and Salmon JJ.)

October	*November*
2: Devizes	12: Bristol
9: Dorchester	26: Winchester
15: Taunton	
22: Bodmin	
30: Exeter	

Northern Circuit (Wallington, Lynskey, Gorman and McNair JJ.)

October	*November*
8: Carlisle	19: Manchester
17: Lancaster	
29: Liverpool	

Oxford Circuit (Stable and Hinchcliffe JJ.)

October	*November*	*December*
2: Reading	12: Hereford	3: Birmingham
9: Oxford	19: Shrewsbury	
16: Worcester	26: Stafford	
23: Gloucester		
31: Newport		

Midland Circuit (Oliver, Jones and Davies JJ.)

October	*November*	*December*
2: Aylesbury	7: Derby	3: Birmingham
8: Bedford	14: Nottingham	
15: Northampton	26: Warwick	
22: Leicester		
30: Lincoln		

North Eastern Circuit (Barnard, Byrne, Streatfeild and Slade JJ.)

October	*November*	*December*
8: Newcastle	7: York	3: Leeds
22: Durham	19: Sheffield	

CENTRAL CRIMINAL COURT, 1957

First Working Day

October 15

COUNTY QUARTER SESSIONS, 1957

October and November

	October
Cambridgeshire	4
Cardiganshire	3
Carmarthenshire	4
Cheshire (Chester)	7
Cheshire (Knutsford)	1
Denbighshire	4
Dorset	2
Essex	2, 29
Essex (Appeals)	24
Glamorganshire (Swansea)	1
Herefordshire	7
Hertfordshire (St. Albans)	7
Hertfordshire (St. Albans: Appeals)	8
Huntingdonshire	1
Isle of Wight	2

	October
Kent, East	7
Kent, West	21
Leicestershire	14
Lincolnshire (Holland: Spalding)	3
Lincolnshire (Kesteven: Sleaford)	17
Norfolk (King's Lynn)	2
Nottinghamshire (Nottingham)	7
Oxfordshire	1
Pembrokeshire	7
Peterborough, Soke of	10
Westmorland	4
Worcestershire	2
Yorkshire, West Riding	7

	November
Essex	27
Hertfordshire (Hertford)	18
Hertfordshire (Apps: Hertford)	18

	November
Kent, East	18
Nottinghamshire (Newark)	11
Pembrokeshire	11

BOROUGH QUARTER SESSIONS, 1957

October and November

	October
Birkenhead	21
Bridgwater	18
Bury St. Edmunds	18
Canterbury	5
Croydon	18

	October
Derby	3
Folkestone	5
Margate	29
Newark	10
Salford	21

	November
Andover	5
Croydon	29
Hereford	22
Maidstone	8

	November
Southend-on-Sea	11
Swansea	6
Winchester	28

Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter "r" appears in brackets (r) do not roll it. The letter "a" by itself is long, as in bay.]

In personam—an act, proceeding or right done or directed against or with reference to a specific person [in per-*so*-nam].

In rem—an act, proceeding or right available against the world at large [in rem].

In specie—in a particular form [in spee-she].

Ipso facto—by the very fact [*ip*-so *fact*-oh].

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Lincoln, Parts of Holland (Boston)	6	Shropshire	1
Montgomeryshire (Welshpool)	2	Somerset (Taunton)	1
Nottinghamshire (Nottingham)	6	Suffolk, West	7
Norfolk (King's Lynn)	8	Warwickshire	7
Norfolk (Norwich)	1	Westmorland	3
Oxfordshire	7	Wiltshire (Devizes)	1
		Worcestershire	8
		Yorkshire, West Riding	6

BOROUGH QUARTER SESSIONS

December, 1957, and January, 1958

	December		December
Abingdon	5	Shrewsbury	28
Dudley	10	Southampton	20
Lichfield	19	Walsall	30
	January		January
Bristol	6	Hereford	31
Bridgwater	17	Maidstone	31
Cardiff	6	Poole	6
Croydon	3	Reading	28
Dover	10	Southend-on-Sea	6

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